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Landlord-Tenant Law: Indiana at the Crossroads

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I. INTRODUCTION

The law of landlord-tenant changed very little from the sixteenth century to the late 1960's. In the sixteenth century the lease was viewed as a conveyance of an estate in land and a part of the law of real property.[1] As a result, the subsequent developments in the law of contracts, such as the doctrine of dependent conditions and the implied warranties of fitness of use and merchantability in consumer transactions, were not incorporated into the law of landlord-tenant.[2]

Although it took the courts five centuries to recognize that a lease is a contract as well as a conveyance of an estate in land, once this occurred it is remarkable how quickly the courts infused contract principles into the law of landlord-tenant. A similar rejection of the common law of landlord-tenant has occurred in an ever-increasing number of states through the enactment of modern landlord-tenant codes. At the end of the 1960's there were only a handful of decisions recognizing an implied warranty of habitability in residential leases,[3] and only a few jurisdictions had modern landlord-tenant

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[1]Hicks, *The Contractual Nature of Real Property Leases*, 24 BAYLOR L. REV. 443, 449-51 (1972). For a discussion of the historical development of landlord-tenant law, see Lesar, *The Landlord-Tenant Relation in Perspective: From Status to Contract and Back in 900 Years?*, 9 U. KAN. L. REV. 369 (1961).

[2]1 AMERICAN LAW OF PROPERTY § 3.11 (A.J. Casner ed. 1952) [hereinafter cited as A.L.P.]; 6 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 890 (3d ed. W. Jaeger 1962).

[3]Buckner v. Azulai, 251 Cal. App. 2d 1013, 59 Cal. Rptr. 806 (1967); Lund v. MacArthur, 51 Haw. 473, 462 P.2d 482 (1969); Lemle v. Breeden, 51 Haw. 426, 462 P.2d 470 (1969); Reste Realty Corp. v. Cooper, 53 N.J. 444, 251 A.2d 268 (1969); Pines v. Perssion, 14 Wis. 2d 590, 111 N.W.2d 409 (1961).

codes.[4] Today, just seven years later, more than half the jurisdictions, by case law, legislation, or a combination thereof, have completely rewritten the law of landlord-tenant.[5]

There appear to be a number of reasons for this phenomenon. The sixties were a time of change when traditional values and institutions were being questioned. While much of the law suffers from senility, few areas were as antiquated and out of touch with the needs of society as was the law of landlord-tenant.[6] Numerous scholarly articles, highly critical of the law of landlord-tenant, appeared in the sixties.[7] Many of the courts to first recognize the contractual nature of the lease cited these articles, suggesting the courts were moved by the logic and eloquence of the authors.[8] But perhaps the courts simply realized that it was time to discard judge-made rules of law, developed in an agrarian society, which no longer served the needs of an urban society.[9]

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[4]Legislative reform began in the late 1960's. Gibbons, *Residential Landlord-Tenant Law: A Survey of Modern Problems with Reference to the Proposed Model Code*, 21 HASTINGS L.J. 369 (1970). A Model Residential Landlord-Tenant Code was drafted in 1968 as a research project of the American Bar Foundation with financial support from the Legal Services Program of the Office of Economic Opportunity. J. LEVI, P. HABLUTZEL, L. ROSENBERG & J. WHITE, MODEL RESIDENTIAL LANDLORD-TENANT CODE 3 (Tent. Draft 1969) [hereinafter cited as MODEL CODE]. The Model Code was used as a starting point when, in 1969, the National Conference of Commissioners on Uniform State Laws established a subcommittee to study landlord-tenant relations. *Report of Committee on Leases, Trends in Landlord-Tenant Law Including Model Code*, 6 REAL PROP., PROB. & TR. J. 550, 557 (1971) [hereinafter cited as *Report of Committee on Leases*]. After nearly three years' work by the subcommittee, the Commissioners approved the Uniform Residential Landlord and Tenant Act [hereinafter cited as URLTA] for enactment in August 1972. Blumberg & Robbins, *Beyond URLTA: A Program for Achieving Real Tenant Goals*, 11 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 1, 3-4 (1976) [hereinafter cited as *Beyond URLTA*]. For a brief discussion of the URLTA provisions, see Note, *The Uniform Residential Landlord and Tenant Act: Reconciling Landlord-Tenant Law with Modern Realities*, 6 IND. L. REV. 741 (1973).

[5]For citations to the statutes and decisions from 29 jurisdictions recognizing an implied warranty of habitability in residential leases, see *Beyond URLTA*, *supra* note 4, at 7-8 n.28.

[6]J. CRIBBET, PRINCIPLES OF THE LAW OF PROPERTY 190 (2d ed. 1975).

[7]Grimes, *Caveat Lessee*, 2 VAL. L. REV. 189 (1968); Lesar, *Landlord and Tenant Reform*, 35 N.Y.U.L. REV. 1279 (1960); Quinn & Phillips, *The Law of Landlord-Tenant: A Critical Evaluation of the Past with Guidelines for the Future*, 38 FORDHAM L. REV. 225 (1969); Schoshinski, *Remedies of the Indigent Tenant: Proposals for Change*, 54 GEO. L.J. 519 (1966); Skillern, *Implied Warranties in Leases: The Need for Change*, 44 DEN. L.J. 387 (1967).

[8]*E.g.*, Lemle v. Breeden, 51 Haw. 426, 433, 462 P.2d 470, 474 (1969); King v. Moorehead, 495 S.W.2d 65, 69 nn.4 & 5, 73 n. 12 (Mo. Ct. App. 1973); Morbeth Realty Corp. v. Velez, 73 Misc. 2d 996, 1000, 343 N.Y.S.2d 406, 410-11 (1973).

[9]

> A rule which in its origin was the creation of the courts themselves, and was supposed in the making to express the *mores* of the day, may be

Another reason for the movement may have been the sudden availability of free legal services for the poor.[10] It was the poor tenant, who was least able to do anything about it, who was affected most by the common law of landlord-tenant.[11] The law was weighted heavily in favor of the landlord, and the tenant maintained scant hope that a justice of the peace or magistrate court would deviate from the existing law. Thus, it required an expensive appeal to obtain any relief from the oppressive common law rules governing the landlord-tenant relationship. Usually the amount in controversy was so small that it was economically unfeasible for even the average middle class tenant to fight an apparent injustice.[12] As a result, there are few landlord-tenant cases to be found among the reported decisions prior to the 1960's. In many of the early decisions of the sixties challenging the outmoded common law of landlord-tenant, the tenant was represented by an attorney from the local legal services office.[13] In fact, at the present time the poor tenant is in a better position than the middle class tenant, or for that matter, the middle class landlord, who must still bear the cost of his own litigation.[14]

Finally, there appears to be a simple explanation for the recent legislative response to the needs of the urban tenant. The total population has been increasing while the number of farm families has diminished.[15] The greater demand resulting from the flight to the cities has created a shortage of decent housing. The sheer number of tenants, combined with their organization of tenant unions, has given

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> abrogated by courts when the *mores* have so changed that perpetuation of the rule would do violence to the social conscience. . . . This is not usurpation. It is not even innovation. It is the reservation for ourselves of the same power of creation that built up the common law through its exercise by the judges of the past.

Jack Spring, Inc. v. Little, 50 Ill. 2d 351, 367, 280 N.E.2d 208, 217 (1972), *quoting from* B. CARDOZO, THE GROWTH OF THE LAW 136-37 (1924).

[10]Gibbons, *supra* note 4, at 370, 376-78; Love, *Landlord's Liability for Defective Premises: Caveat Lessee, Negligence, or Strict Liability?*, 1975 WIS. L. REV. 19, 92.

[11]*Report of the Committee on Leases*, *supra* note 4, at 554-57.

[12]2 R. POWELL, THE LAW OF REAL PROPERTY ¶ 250[3] (P. Rohan ed. 1967).

[13]E. RABIN, FUNDAMENTALS OF MODERN REAL PROPERTY LAW 33 (1974).

[14]For example, in Marini v. Ireland, 56 N.J. 130, 265 A.2d 526 (1970), the tenant was able to deploy the full resources and staff of the local Legal Services Office, while the landlord would have incurred legal expenses of several thousand dollars in an effort to recover $95.00 withheld rent had his private attorneys not agreed to continue as counsel, without compensation, following an appeal from a judgment in favor of the landlord. Letter from William R. Hyland, *quoted in* RABIN, *supra* note 13, at 56-58.

[15]According to the 1920 census, 30.1 percent of the nation's population lived on farms. By 1960 the farm population had fallen to 8.7 percent, and to 4.8 percent in 1970. U.S. BUREAU OF THE CENSUS, CURRENT POPULATION REPORTS: FARM POPULATION, Ser.-ERS, P-27, No. 47, at 1 (Sept. 1976).

them considerable political power.[16] In industrial states such as New York and New Jersey, where most of the population lives in large metropolitan areas and there is a shortage of decent housing, the state legislatures have enacted modern landlord-tenant codes.[17] In midwestern states, such as Indiana, however, where a large percentage of the population still resides in rural areas or small towns, the problem may not appear as critical to state legislators.[18] This may help explain why the Indiana legislature has failed to enact a modern landlord-tenant code and why a judicial response to the needs of the urban tenant was finally compelled.

Whatever the reason, the law of landlord-tenant is being rewritten. In some states the changes have already taken place, but in others, such as Indiana, the changes are just beginning. The purpose of this Article is therefore twofold: First, to point out new developments in Indiana's landlord-tenant law, specifically *Old Town Development Co. v. Langford*,[19] and second, to suggest further changes which are likely to occur based upon trends in other jurisdictions.

The focus of this Article is limited to an analysis of landlord-tenant law as it relates to *residential* leases, partly for the sake of manageability, but primarily because *Old Town*, the decisions of other jurisdictions, and the statutes revolutionizing the law of landlord-tenant have focused on the plight of the urban residential tenant. This is not to say that much of the same rationale dictating a warranty of habitability in a residential lease would not apply equally in a commercial setting;[20] however, there are important differences which cannot be fully developed within the confines of

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[16]Blumberg & Robbins, *The Landlord Security Deposit Act*, 7 CLEARINGHOUSE REV. 411 (1973); *Beyond URLTA*, *supra* note 4, at 45-46. For a comprehensive study of how the sheer number of tenants, plus their rising middle class standards, has had a localized impact, see Baar, *Rent Control in the 1970's: The Case of the New Jersey Tenants' Movement*, 28 HASTINGS L.J. 631 (1977).

[17]For discussion of the New Jersey and New York statutes going beyond even the URLTA reforms, see generally *Beyond URLTA*, *supra* note 4.

[18]In 1970, 85.6 percent of the population of New York State lived in urban areas and in New Jersey the figure was even higher—88.9 percent. U.S. BUREAU OF THE CENSUS, CENSUS OF POPULATION: 1970, Vol. 1, *Characteristics of the Population*, Part 1, United States Summary § 1, Table 18. In contrast, in 1970, only 64.9 percent of the population of Indiana lived in urban areas. *Id.* And these statistics do not tell the whole story because the urban areas in New York and New Jersey are far more densely populated than those of Indiana.

[19]349 N.E.2d 744 (Ind. Ct. App. 1976).

[20]It appears that the analogy to the warranties under the UCC, for example, should apply equally to commercial leases. Love, *supra* note 10, at 103-04.

this Article.[21] Also, the possibility should be noted that the warranty of habitability may be applied differently in the residential setting depending on whether multi-unit or single family dwellings are involved.[22] However, since only one jurisdiction has limited the warranty of habitability to multi-unit residential dwellings,[23] and since the rationale for the warranty appears to apply equally to both types of dwellings,[24] we shall ignore such distinctions.

II. Traditional Landlord-Tenant Law

A. The Lease As a Conveyance

Until a few years ago the law viewed the lease as a conveyance of an estate in land.[25] The landlord gave the tenant possession of the land for a term and in return the tenant gave the landlord a sum of money as rent for the use and enjoyment of the land. There were no implied promises in a lease, other than the landlord's convenant of quiet enjoyment, *i.e.*, that the landlord would do nothing to interfere with the tenant's use and enjoyment of the land during the term of the lease.[26] Neither party was under a duty to make repairs or maintain

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[21]There does not appear to be a shortage of suitable commercial property; the commercial tenant may therefore be in a better position to negotiate a lease rather than being forced to accept a form lease on a take it or leave it basis. RESTATEMENT (SECOND) OF PROPERTY, LANDLORD AND TENANT § 5.1, Comment *b*, at 175 (Tent. Draft No. 1, 1973) [hereinafter cited as RESTATEMENT DRAFT 1]. *But see* Weaver v. American Oil Co., 257 Ind. 458, 276 N.E.2d 144 (1971). Several jurisdictions have refused to imply a warranty of habitability in commercial leases. *See, e.g.*, Interstate Restaurants, Inc. v. Halsa Corp., 309 A.2d 108 (D.C. Ct. App. 1973); Yuan Kane Ing v. Levy, 26 Ill. App. 3d 889, 326 N.E.2d 51 (1975); Van Ness Indus., Inc. v. Claremont Painting & Decorating Co., 129 N.J. Super. 507, 324 A.2d 102 (1974). Similarly, URLTA, as its name suggests, does not apply to commercial or agricultural leases. URLTA, *supra* note 4, § 1.101, Comment.

[22]When a single family residence is involved, the URLTA would permit the landlord to shift his duty to the tenant with regard to certain minor repairs and maintenance, if accomplished by a "good faith" written agreement supported by adequate consideration. URLTA, *supra* note 4, § 2.104(c).

[23]Although several courts have used the term "apartment" when discussing the implied warranty of habitability in residential leases, *see, e.g.*, Old Town Dev. Co. v. Langford, 349 N.E.2d at 764, only Illinois has actually limited the warranty to multi-unit dwellings. *See* Jack Spring, Inc. v. Little, 50 Ill. 2d 351, 280 N.E.2d 208 (1972); Yuan Kane Ing v. Levy, 26 Ill. App. 3d 889, 326 N.E.2d 51 (1975).

[24]Jack Spring, Inc. v. Little, 50 Ill. 2d at 363, 280 N.E.2d at 221-22 (dissenting opinion); Moskovitz, *The Implied Warranty of Habitability: A New Doctrine Raising New Issues*, 62 CAL. L. REV. 1444, 1447 (1974).

[25]Hicks, *supra* note 1; Lesar, *supra* note 1.

[26]*E.g.*, Hoagland v. New York, C. & St. L. Ry., 111 Ind. 443, 12 N.E. 83 (1887); Avery v. Dougherty, 102 Ind. 443, 2 N.E. 123 (1885). *See generally* 2 POWELL, *supra* note 12, ¶ 225[3].

the premises,[27] although the tenant was under a duty not to commit waste.[28] Under the doctrine of caveat emptor the tenant was presumed to have inspected the land and to have accepted it "as is."[29]

B. The Doctrines of Independent Covenants and Constructive Eviction

At common law all covenants in leases were held to be independent. In the agrarian society in which the law of landlord-tenant developed the right to possession of the land was the most important aspect of the lease, and all other covenants in the lease were of secondary importance.[30] As long as the tenant's peaceful use and enjoyment of the land were not disturbed by the landlord, there could be no failure of consideration. Thus, if the landlord breached an obligation under the lease the tenant could sue for damages,[31] but the tenant's duty to pay the full amount of the reserved rent continued as long as he remained in possession of the land, *i.e.*, as long as he was not evicted by the landlord.[32]

At early common law, the doctrine of independent covenants could be equally harsh on the landlord. If the tenant failed to pay the rent, the landlord could not evict him since the breach of an independent covenant did not work a forfeiture of the estate.[33] The landlord was quick to remedy this situation, however, by making the tenant's covenants "conditions subsequent" and by including a power of termination clause in the lease, thereby reserving the right to reenter and terminate the estate for the tenant's breach of any condition in the lease.[34] Thus the standard lease, drafted by the landlord's attorney, made the tenant's right to continued possession of

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[27]3A G. THOMPSON, COMMENTARIES ON THE MODERN LAW OF REAL PROPERTY § 1230 (J. Grimes, 1959 Repl.). Indiana followed this general rule, *see* Hanson v. Cruse, 155 Ind. 176, 57 N.E. 904 (1900), but not without criticism. *See* Grimes, *supra* note 7, at 202.

[28]3A THOMPSON, *supra* note 27, §§ 1230, 1270-80.

[29]1 A.L.P., *supra* note 2, § 3.45. There were several exceptions to this general rule, however. *Id;* Grimes, *supra* note 7, at 193; Comment, *Implied Warranty of Habitability in Lease of Furnished Premises for Short Term: Erosion of Caveat Emptor*, 3 RICH. L. REV. 322 (1969). Indiana followed the general rule, but did recognize exceptions. *See, e.g.*, Anderson Drive-In Theatre, Inc. v. Kirkpatrick, 123 Ind. App. 388, 110 N.E.2d 506 (1953).

[30]King v. Moorehead, 495 S.W.2d 65, 69 (Mo. Ct. App. 1973); Quinn & Phillips, *supra* note 7, at 227-28.

[31]Bryan v. Fisher, 3 Blackf. 316 (1883).

[32]*Id.*

[33]Brown v. Bragg, 22 Ind. 122 (1864).

[34]2 POWELL, *supra* note 12, ¶ 231; 3A THOMPSON, *supra* note 27, §§ 1324-26.

the premises dependent upon his compliance with the conditions in the lease.

In addition, in the nineteenth century most states, including Indiana, enacted forcible entry and unlawful detainer statutes (hereinafter referred to as FED statutes) which provided the landlord with a quick and summary procedure for evicting the tenant for nonpayment of rent.[35] The majority of these statutes permitted the landlord to evict the tenant for nonpayment of rent despite the absence of a forfeiture provision in the lease.[36] Since the other covenants in the lease were viewed as independent, the courts would not allow the tenant to raise the landlord's breach of an obligation in the lease as a defense to the action for possession.[37]

Finally, at early common law even conditions in a contract were considered to be independent;[38] the contract doctrine of dependent conditions did not develop until the eighteenth century. By this time, the rental agreement was clearly governed by the law of real property and not contract law, so the doctrine never became part of the law of landlord-tenant.[39] It was only recently, when the courts recognized that a lease is a contract as well as a conveyance of land, that contract principles became applicable to the rental agreement.[40]

To meliorate the harshness of the doctrine of independent covenants the courts gradually developed the doctrine of constructive eviction.[41] Rather than requiring an actual physical eviction of the tenant to terminate the estate, and with it the rental obligation, the courts began to hold that the tenant could treat the landlord's breach of a convenant in the lease materially affecting the tenant's use and enjoyment of the land as a "constructive" eviction.[42] However, since the constructive eviction terminated the tenant's obligation to pay

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[35]*E.g.*, IND. CODE § 32-7-1-5 (Burns 1973). For a list of the statutes from other states providing for summary eviction upon nonpayment of rent, see RESTATEMENT (SECOND) OF PROPERTY, LANDLORD AND TENANT, Statutory Note to § 11.1, at 24-30 (Tent. Draft No. 3, 1975) [hereinafter cited as RESTATEMENT DRAFT 3].

[36]RESTATEMENT DRAFT 3, *supra* note 35, Statutory Note to § 11.1, at 25-29. Indiana is among this majority. *See* Templer v. Muncie Lodge, I.O.O.F., 50 Ind. App. 324, 328, 97 N.E. 546, 547-48 (1912).

[37]*See, e.g.*, Lindsey v. Normet, 405 U.S. 56 (1972). *But cf., e.g.*, Rene's Restaurant Corp. v. Fro-Du-Co Corp., 137 Ind. App. 559, 210 N.E.2d 385 (1965). *See generally* Clough, *The Case Against the Doctrine of Independent Covenants: Reform of Oregon's FED Procedure*, 52 ORE. L. REV. 39 (1972).

[38]6 WILLISTON, *supra* note 2, § 890.

[39]*Id.*; 1 A.L.P., *supra* note 2, § 3.11.

[40]Lesar, *supra* note 1, at 375.

[41]For a brief history of the development of the doctrine of constructive eviction, see Rapacz, *Origin and Evolution of Constructive Eviction in the United States*, 1 DEPAUL L. REV. 69 (1951).

[42]1 A.L.P., *supra* note 2, § 3.51.

rent only because the tenant was no longer considered to be in possession of the land, the law required the tenant to actually vacate the premises.[43] If the tenant failed to vacate the premises within a reasonable time after the landlord's breach of the covenant, the tenant was deemed to have waived his right to terminate the rental agreement.[44]

One of the major problems with this remedy at common law was the law's failure to impose any affirmative duties on the landlord, along with the landlord's practice of rarely agreeing to assume any obligations which might give rise to a constructive eviction. Thus, if the premises were uninhabitable at the beginning of the term, or if they became uninhabitable during the term from lack of repairs, the tenant could not claim a constructive eviction. The recognition of an implied warranty of habitability solves this problem by creating a duty on the part of the landlord to turn over the premises in a habitable condition at the beginning of the term and to maintain it in a habitable condition during the term. If the landlord breaches this duty the tenant can treat the breach as a constructive eviction and terminate the lease.[45]

Even with the recognition of an implied warranty of habitability, however, two major problems with the remedy of constructive eviction remain. First, the act or omission of the landlord must be material; not every interference by the landlord will give rise to a breach of the covenant of quiet enjoyment.[46] If the court later determines that the tenant was not justified in treating the default of the landlord as a constructive eviction, the tenant's vacation of the premises will be considered an abandonment rendering him liable for the remaining rent even though he has lost all use and enjoyment of the land.[47]

Second, in order to treat the breach of the covenant of quiet enjoyment as a constructive eviction, the tenant is required to vacate the premises within a reasonable time.[48] If he remains in possession he must seek his remedy through an action for damages.[49] In areas where there is a shortage of adequate housing, this may prove to be a very unsatisfactory remedy since the tenant will be unable to obtain

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[43]*See, e.g.*, Talbott v. English, 156 Ind. 299, 307, 59 N.E. 857, 860 (1901).

[44]*Id.; see generally* 2 POWELL, *supra* note 12, ¶ 225[3], at 278-79; Rapacz, *supra* note 41, at 86-87.

[45]*See, e.g.*, Marini v. Ireland, 56 N.J. 130, 265 A.2d 526 (1970).

[46]*E.g.*, Talbot v. Citizens Nat'l Bank, 389 F.2d 207 (7th Cir. 1968).

[47]*E.g.*, Aberdeen Coal & Mining Co. v. City of Evansville, 14 Ind. App. 621, 43 N.E. 316 (1896).

[48]*See* authorities cited note 44 *supra.*

[49]*See* Bryan v. Fisher, 3 Blackf. 316 (1833).

substitute housing[50] (not to mention the time and expense of relocating). Instead, the tenant would prefer to remain in possession and either correct the default himself and deduct the cost from his rent, or bring pressure on the landlord to remedy the default by withholding all or part of the rent. Unfortunately, these remedies are not available to the tenant under traditional landlord-tenant law because of the doctrine of independent covenants. If the tenant corrects the condition and deducts the cost from the rent, the landlord will immediately file suit for possession under the local FED statute. Under this summary procedure the only issue is whether there is any rent due and owing, and since the landlord's breach of an independent covenant does not relieve the tenant from his obligation to pay rent, the court will grant a judgment for possession.

III. Trends in Landlord-Tenant Law

A. The Implied Warranty of Habitability

1. Historical Development and Rationale

(a) Contract Principles

The real property concepts which governed the law of landlord-tenant led to the doctrine of caveat lessee. Perhaps the doctrine was not unsuited to the agrarian society in which it developed:

> The parties were substantially on an equal bargaining level and the average tenant was capable of inspecting the land for possible defects prior to entering the lease. Often the land contained no physical structures, and if present, they were normally simple in design and of secondary importance to the purpose of the lease. If defects arose during the term of the lease, the tenant was usually possessed of both the skill and the resources to make the necessary repairs.[51]

The doctrine is not well suited, however, to the needs of an urban society. Today's tenant is not interested in the land, but instead in a shelter, a shelter far different from the simple abode of the medieval peasant. The complexity of our modern urban dwellings with their sophisticated heating, electrical, and plumbing systems, often hidden from view and located in areas under the control of the landlord, makes inspection difficult if not impossible.[52] More importantly, the

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[50]Loeb, *The Low-Income Tenant in California: A Study in Frustration*, 21 Hastings L.J. 287, 304-05 (1970); Schoshinski, *supra* note 7, at 530-31.

[51]Old Town Dev. Co. v. Langford, 349 N.E.2d at 754.

[52]Green v. Superior Court, 10 Cal. 3d 616, 517 P.2d 1168, 111 Cal. Rptr. 704 (1974).

tenant is no longer simply purchasing land, but is purchasing a "package of goods and services," and is relying upon the landlord's ability to provide them.[53]

Having recognized that the tenant is a consumer of goods, the courts logically turned to the law of contracts governing consumer transactions:

> Modern contract law has recognized that the buyer of goods and services in an industrialized society must rely upon the skill and honesty of the supplier to assure that goods and services purchased are of adequate quality. In interpreting most contracts, courts have sought to protect the legitimate expectations of the buyer and have steadily widened the seller's responsibility for the quality of goods and services through implied warranties of fitness and merchantability.[54]

While the warranties of fitness of use and merchantability implied in the sale of goods and codified in the Uniform Commercial Code (UCC) did not originally extend to the sale or lease of real property, within the last few years the courts have begun to apply the UCC provisions by analogy to non-sale of goods situations.[55]

Many jurisdictions now recognize an implied warranty of fitness in the sale of a new house by a builder-vendor, thereby extending the UCC warranties to the sale of real property.[56] Almost paralleling this development has been the recognition of an implied warranty of habitability in residential leases. In *Theis v. Heuer*,[57] when the Indiana Supreme Court discarded the doctrine of caveat emptor in the sale of a new house by a builder-vendor and replaced it with an

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[53]In Javins v. First Nat'l Realty Corp., 428 F.2d 1071 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970), the most quoted case in this area, Judge Skelly Wright observed:

> When American city dwellers, both rich and poor, seek "shelter" today, they seek a well known package of goods and services — a package which includes not merely walls and ceilings, but also adequate heat, light and ventilation, serviceable plumbing facilities, secure windows and doors, proper sanitation, and proper maintenance.

Id. at 1074 (footnote omitted).

[54]*Id.* at 1075 (footnotes omitted). "[A] lease is, in essence, a sale as well as a transfer of an estate in land and is, more importantly, a contractual relationship." Lemle v. Breeden, 51 Haw. 426, 433, 462 P.2d 470, 474 (1969).

[55]Farnsworth, *Implied Warranties of Quality in Non-Sales Cases*, 57 COLUM. L. REV. 653 (1957); Murray, *Under the Spreading Analogy of Article 2 of the Uniform Commercial Code*, 39 FORDHAM L. REV. 447 (1971). *See, e.g.*, Gilbert v. Stone City Constr. Co., 357 N.E.2d 738 (Ind. Ct. App. 1976) (bystander construction inspector had sufficient 402A strict liability claim against lessor of construction equipment to get to the jury).

[56]Note, *Implied Warranty of Fitness of Habitation in Sale of Residential Dwellings*, 43 DEN. L.J. 379 (1966).

[57]280 N.E.2d 300 (Ind. 1972).

implied warranty of fitness, it noted in dictum: "There is a parallel development in the law which is relevant but not necessary for our decision here. It is in the area of landlord-tenant. Modern case law is now finding an implied warranty of habitability by a landlord to his tenant."[58] That the court went out of its way to comment on the similar development in the area of landlord-tenant law suggests that it will not be unmindful of this trend when the question of an implied warranty of habitability in residential leases is presented to it.

(b) Public Policy

While there can be little doubt that the implied warranty of habitability is a logical and necessary implication resulting from the recognition that a lease creates a contractual relationship, there appears to be a second and entirely separate rationale for the imposition of an implied warranty of habitability in the residential lease. This rationale is based on the same public policy consideration which led to the enactment of housing codes—that there should be "a decent home and a suitable living environment for every American family."[59]

Housing codes have existed since the turn of the century, but the history of housing code enforcement is a study in frustration: understaffed and underfunded enforcement agencies, soft prosecution, sympathetic courts, and fines so small in relation to the cost of compliance that landlords have simply accepted the fines as a part of the cost of doing business.[60] While housing and health codes place a duty on the owner of a structure to maintain it in a safe and sanitary condition, the courts have generally held that these statutes are criminal in nature and create no civil rights for the tenant or in any way affect the landlord-tenant relationship.[61]

In many of the decisions recognizing an implied warranty of habitability in residential leases there is language suggesting a public policy rationale. A number of courts have taken judicial notice of the shortage of decent housing and the resultant unequal bargaining position of the parties, concluding that the recognition of

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[58]*Id.* at 305 n.1.

[59]Housing Act of 1949, ch. 338, § 2, 63 Stat. 413.

[60]Grad, *Legal Remedies for Housing Code Violations* (Research Report No. 14 of the Nat'l Comm. on Urban Problems 1968) [hereinafter cited as Grad]; Gribetz & Grad, *Housing Code Enforcement: Sanctions and Remedies*, 66 COLUM. L. REV. 1254 (1966) [hereinafter cited as Gribetz & Grad]. As late as 1969 fines for code violations in New York City averaged only $12.62. Rutzick & Huffman, *The New York City Housing Court: Trial and Error in Housing Code Enforcement*, 50 N.Y.U.L. REV. 738 (1975).

[61]*See, e.g.*, Fechtman v. Stover, 139 Ind. App. 166, 199 N.E.2d 354 (1964).

an implied warranty of habitability in residential leases is the only way to insure adequate housing.[62] The courts have further noted that the average tenant does not possess the skills to maintain complex electrical and heating systems, nor does he have the funds or sufficient economic interest in the leasehold to justify the expenditure of vast sums of money for repairs which will primarily benefit the landlord.[63] Consequently, unless the landlord makes these repairs no one will make them, and in time the property will become a part of our shameful substandard housing statistics. Thus, the doctrine of caveat emptor is inconsistent with the public policy regarding housing standards, the same policy which led to the enactment of housing and sanitation codes.[64]

In *Pines v. Perssion*,[65] the first case to break completely with the common law by recognizing a warranty of habitability in a residental lease, the Supreme Court of Wisconsin remarked:

> Legislation and administrative rules, such as the safeplace statute, building codes, and health regulations, all impose certain duties on a property owner with respect to the condition of his premises. . . . To follow the old rule of no implied warranty of habitability in leases would, in our opinion, be inconsistent with the current legislative policy concerning housing standards. . . . Permitting landlords to rent "tumble-down" houses is at least a contributing cause of such problems as urban blight, juvenile delinquency, and high property taxes for conscientious landowners.[66]

While the courts can base the warranty of habitability on either a contract or public policy rationale there is one situation in which the particular rationale used could be important. Undoubtedly landlords will attempt to obtain the tenant's "waiver" of the warranty in the

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[62]Schoshinski, *supra* note 7, at 552-57. *See, e.g.*, Berzito v. Gambino, 63 N.J. 460, 308 A.2d 17 (1973).

[63]*See, e.g.*, Javins v. First Nat'l Realty Corp., 428 F.2d at 1078-79.

[64]*See* Marini v. Ireland, 56 N.J. 130, 265 A.2d 526 (1970) (analyzing landmark decisions on this point).

[65]14 Wis. 2d 590, 111 N.W.2d 409 (1961).

[66]*Id.* at 595-96, 111 N.W.2d at 412-13.

Likewise, in the *Javins* case, the court, after discussing the contractual nature of the lease, concluded:

> In our judgment, the old no-repair rule cannot coexist with the obligations imposed on the landlord by a typical modern housing code, and must be abandoned in favor of an implied warranty of habitability. In the District of Columbia, the standards of this warranty are set out in the Housing Regulations.

428 F.2d at 1076-77 (footnotes omitted).

standard form lease, or will claim that the tenant, by his knowledge of the existence of patent defects materially affecting health or safety at the time of the lease, waived his right to complain about them. If the implied warranty is based on a contract theory a court should have no difficulty with an intelligent waiver of the warranty, but under a public policy rationale a court might hold that there can be no waiver of housing or health code standards.[67]

(c) Old Town

In view of this trend towards the recognition of an implied warranty of habitability in residential leases, it should not have come as a complete shock that in July 1976, the Indiana Court of Appeals in *Old Town* rejected the "hoary precepts of primordial common law" in favor of an implied warranty of habitability. In a lengthy opinion, and after a careful and detailed analysis of the common law rules governing landlord-tenant relations, Judge Paul Buchanan, Jr. concluded:

> [W]e must decide if this Court will chant again the centuries old litany of *caveat* lessee. Or, do we look to the contemporary social and economic scene and adopt an implied warranty of habitability and nonimmunity in tort as the most accurate expression of the ultimate reality between today's residential landlord and tenant? Judge-made law created *caveat* lessee and judge-made law can discard it. The common law is a malleable tool. Five centuries of *caveat* lessee is enough.[68]

In rejecting the doctrine of caveat emptor, the Indiana Court of Appeals noted that "the single most important reason was recognition that the lease had been gradually transformed from essentially a conveyance to a contract . . . ."[69] The court went on to draw the analogy between the sale of goods, carrying with it an implied warranty of fitness and merchantability, and the leasing of real property,[70] concluding: "In summary then we have rejected *caveat* lessee and have found that an apartment (residential) lease is essentially contractual in nature carrying with it mutually dependent covenants including an implied warranty of habitability and the full range of remedies for breach of contract . . . ."[71]

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[67]*See* pp. 607-09 *infra* for a discussion of these waiver concepts.

[68]Old Town Dev. Co. v. Langford, 349 N.E.2d at 764.

[69]*Id.* at 755.

[70]*Id.* at 756-59.

[71]*Id.* at 764. The court earlier listed these remedies as "*damages*, rescission, specific performance, reformation, and rent abatement." *Id.* at 761 (emphasis in original).

While the court emphasized the contractual nature of the lease and the growing similarity between merchant-consumer and landlord-tenant transactions, there is language in the case suggesting a broader base for the warranty. The court noted that additional factors prompting the reevaluation of landlord-tenant law are the "widespread enactment of housing codes" and the "shortage of low-cost housing (creating a disparity in bargaining power between landlords and residential tenants)."[72] Similarly, the court quoted, with apparent approval, language from other decisions which relied on a public policy rationale.[73]

While review of *Old Town* is currently pending in the Indiana Supreme Court,[74] the creation of an implied warranty of habitability is presumably of sufficient public importance to compel the court to comment in some manner, especially in light of its own recent decisions in the area of implied warranty of habitability[75] and other activities throughout the state.[76]

(d) Resulting Standards

The separate bases for the implied warranty of habitability in residential leases lead to a problem in determining when the warranty has been complied with or breached. A number of jurisdictions, particularly those using the public policy rationale for the warranty, have looked to the local housing and health codes for the standard.[77] While some of these decisions suggest that the codes establish only a "minimum" standard,[78] others can be read as holding

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[72]*Id.* at 756.

[73]*Id.*, *quoting from* Javins v. First Nat'l Realty Corp., 428 F.2d 1071 (D.C. Cir. 1970); *also citing* Pines v. Perssion, 14 Wis. 2d 590, 111 N.W.2d 409 (1961).

[74]Petition to transfer was filed with the Indiana Supreme Court by appellant-landlord Old Town on September 23, 1976.

[75]*E.g.*, Barnes v. Mac Brown & Co., 342 N.E.2d 619 (Ind. 1976) (implied warranty of fitness for habitation from builder to second owner); Theis v. Heuer, 280 N.E.2d 300 (Ind. 1972) (same warranty to first owner).

[76]The subject has been before the Indiana General Assembly. *See* pp. 641-42 *infra.* Additionally, litigation is currently being pursued at the trial court level. *See* The Advocate, January 1977, at 15 (newspaper published by LSG of Indianapolis, listing Welborn v. Society for the Propagation of the Faith on remand to be considered in light of *Old Town*) [hereinafter cited as The Advocate].

[77]"In the District of Columbia, the standards of this warranty are set out in the Housing Regulations." Javins v. First Nat'l Realty Corp., 428 F.2d at 1077. "It is an obligation which the landlord fulfills by substantial compliance with the relevant provisions of an applicable housing code." King v. Moorehead, 495 S.W.2d at 75.

[78]"[W]e point out that several courts have equated adherence to applicable building and housing code standards with the *bare requirements* for compliance with this warranty." Old Town Dev. Co. v. Langford, 349 N.E.2d at 780 n.44 (citations omitted) (emphasis in original). "[R]elevant local health regulations provide . . . the

that the codes establish the "maximum" standard.[79] This latter position has been criticized by legal scholars because it creates a standard too low to be of any value to tenants who are above the poverty level.[80]

Other courts appear to have created a "judicial" standard separate and distinct from the housing code standards.[81] The judicial standard has several advantages over the code standard. First, it would create a statewide standard. Secondly, it would apply in those areas without local housing and health codes.[82] Finally, it would not be subject to the rule of *inclusio unis est exclusio alterius* and might offer relief to middle class tenants by considering such factors as the amount of rent, the age of the structure, and its location in determining the scope of the warranty of habitability based upon the expectations of the parties.[83] The major difficulty with the judicial standard is that it is not as precise as the code standard and could take years to establish on a case-by-case basis, thereby leading to uncertainty and litigation.[84]

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threshold requirements that all housing must meet." Boston Housing Auth. v. Hemingway, 363 Mass. 184, 200-01, 293 N.E.2d 831, 844 n.16 (1973) (emphasis in original).

[79]*E.g.*, Jack Spring, Inc. v. Little, 50 Ill. 2d 351, 280 N.E.2d 208 (1972); King v. Moorehead, 495 S.W.2d 65 (Mo. Ct. App. 1973).

[80]The tenant in a luxury apartment, for example, may legitimately expect the landlord to supply janitorial service, elevator service, and air conditioning in the summer; however, it is very unlikely that such requirements will be found in a typical housing code. *See generally* Moskovitz, *supra* note 24, at 1457-58; Comment, *Landlord-Tenant Law Reform—Implied Warranty of Habitability: Effects and Effectiveness of Remedies for Its Breach*, 5 TEX. TECH. L. REV. 749, 760 (1974).

[81]Love, *supra* note 10, at 101-03.

[82]*Id.* at 102-03.

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> The nature of the deficiency, its effect on habitability, the length of time for which it persisted, the age of the structure, the amount of the rent, the area in which the premises are located, whether the tenant waived the defects, whether the defects resulted from malicious, abnormal, or unusual use by the tenant, are among the factors to be considered in deciding if there has been a breach of the warranty of habitability.

Kline v. Burns, 111 N.H. 87, 93, 276 A.2d 248, 252 (1971) (citations omitted).

[84]Boston Housing Auth. v. Hemingway, 363 Mass. at 215, 293 N.E.2d at 852 (dissenting opinion). It should be noted, however, that the same vagueness exists in some housing codes compelling several courts to reject them as standards for the implied warranty of habitability, *e.g.*, Posnanski v. Hood, 46 Wis. 2d 172, 174 N.W.2d 528 (1970) ("reasonably good state of repairs"; "clean and sanitary condition"; "adequately"; "reasonably good working conditions"), *citing* Saunders v. First Nat'l Realty Corp., 245 A.2d 836 (D.C. Ct. App. 1968), but this has been no impediment to other courts using the same housing code standards. *See, e.g.*, Javins v. First Nat'l Realty Corp., 428 F.2d 1071 (D.C. Cir. 1970) (*Saunders* on appeal).

Whether a court adopts the code standard or the judicial standard, it is clear from a reading of the cases that minor defects will not be treated as a breach of the warranty of habitability. Courts utilizing the code standard will treat minor code violations not affecting health or safety as "de minimis."[85] Similarly, courts using the judicial standard have held that the lack of certain amenities, while unpleasant, does not render the premises uninhabitable.[86]

Although the court in *Old Town* noted the two distinct standards for the warranty, it determined that "the permissible scope of the implied warranty of habitability is not at issue here . . . ."[87] The court's conclusion was correct since the case involved a latent defect, known to the landlord but unknown to the tenant, which was a violation of the local housing code materially affecting health and safety.

2. Nature of the Implied Warranty

There are two distinct branches or aspects of the implied warranty of habitability:

> [T]he implied warranty of habitability burdens the landlord with two obligations . . . a warranty of fitness and a duty to repair. By renting an apartment for residential use the landlord impliedly (1) *warrants* that the leasehold is then free from any latent defects or conditions rendering the premises uninhabitable for residential purposes; and (2) *promises* that the premises will remain reasonably fit for residential purposes during the entire term, a promise which necessarily carries with it an implied duty to repair.[88]

The first branch of the warranty is much like the warranty of fitness for use found in the UCC. The second branch is similar to the duty to repair imposed upon the owner of a structure by housing and

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[85] *E.g.*, Diamond Housing Corp. v. Robinson, 257 A.2d 492, 494 (D.C. Ct. App. 1969).

[86]

> In a modern society one cannot be expected to live in a multi-storied apartment building without heat, hot water, garbage disposal or elevator service. Failure to supply such things is a breach of the implied covenant of habitability. Malfunction of venetian blinds, water leaks, wall cracks, lack of painting, at least of the magnitude presented here, go to what may be called "amenities." Living with lack of painting, water leaks and defective venetian blinds may be unpleasant, aesthetically unsatisfying, but does not come within the category of uninhabitability.

Academy Spires, Inc. v. Brown, 111 N.J. Super. 477,482-83, 268 A.2d 556, 559 (1970).

[87] 349 N.E.2d at 780 n.44.

[88] *Id.* at 774 (emphasis in original).

health codes.[89] For purposes of discussion it is easier to treat each branch of the warranty separately.

(a) Warranty of Fitness at the Lease's Inception

One of the major problems with regard to the first branch of the implied warranty is whether it applies to "patent" defects observable by the tenant at the time of the lease. The language of some cases suggests that it applies only to "latent" defects, *i.e.*, defects which are hidden and not discoverable by a reasonable inspection of the premises and which later surface to render the dwelling unfit for habitation.[90] There have actually been very few cases dealing with this question; most of the cases have involved latent defects or defects arising under the second aspect of the warranty.

Several courts in dicta have suggested that the warranty does not apply to patent defects which the tenant voluntarily, knowingly, and intelligently waives.[91] A number of cases, however, have indicated that it would be against public policy to allow a landlord to lease an uninhabitable dwelling.[92] If the court is basing the implied warranty of habitability on an analogy to a consumer sales contract then a waiver seems well founded, since such patent defects are not within the warranty under the UCC.[93]

If, on the other hand, the court is basing the warranty on public policy—the duties imposed upon the landlord by housing and health codes—it would seem inconsistent to relieve the landlord of his duty to maintain a safe and sanitary structure simply because the tenant is aware of the conditions. In *Foisy v. Wyman*,[94] one of the few cases directly on point, the Washington Supreme Court refused to allow the tenant to waive patent defects even though there was consideration for the waiver. "A disadvantaged tenant should not be placed in a position of agreeing to live in an uninhabitable premises. Housing

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[89]"[T]he old no-repair rule cannot coexist with the obligations imposed on the landlord by a typical modern housing code . . . ." Javins v. First Nat'l Realty Corp., 428 F.2d at 1076-77.

[90]Old Town Dev. Co. v. Langford, 349 N.E.2d at 775.

[91]*See, e.g.*, Green v. Superior Court, 10 Cal. 3d 616, 621, 517 P.2d 1168, 1170-71, 111 Cal. Rptr. 704, 706-07 n.3 (1974); Mease v. Fox, 200 N.W.2d 791, 797 (Iowa 1972).

[92]*See, e.g.*, Javins v. First Nat'l Realty Corp., 428 F.2d 1071 (D.C. Cir. 1970); Foisy v. Wyman, 83 Wash. 2d 22, 515 P.2d 160 (1973); Pines v. Perssion, 14 Wis. 2d 590, 111 N.W.2d 409 (1961).

[93]

> [W]hen the buyer before entering into the contract has examined the goods or the sample or model as fully as he desired or has refused to examine the goods there is no implied warranty with regard to defects which an examination ought in the circumstances to have revealed to him . . . .

IND. CODE § 26-1-2-316(3)(b) (Burns 1974).

[94]83 Wash. 2d 22, 515 P.2d 160 (1973).

conditions, such as the record indicates exist in the instant case, are a health hazard, not only to the individual tenant, but to the community which is exposed to said individual."[95]

The Uniform Residential Landlord and Tenant Act does not appear to distinguish between latent and patent defects or defects existing at the inception of the lease and those occurring thereafter. Instead, it imposes a duty on the landlord to comply with provisions of local housing codes materially affecting health and safety and to maintain the premises in a habitable condition during the term of the lease.[96] Since the tenant cannot waive his rights in the rental agreement,[97] it seems his knowledge of the defective condition would be immaterial. The *Restatement (Second) of Property* has taken the position that the tenant may freely and intelligently waive defective conditions existing at the time of the lease which do not materially affect the tenant's health or safety,[98] but that the knowledge of the defective conditions is not itself a waiver, since in most situations the tenant may assume that the landlord will correct the conditions.[99] Likewise, a court should not permit an unconscionable waiver of the warranty which is forced upon the tenant because of an unequal bargaining position.[100]

In *Old Town*, since the defect involved was latent, it was not necessary for the court to decide whether patent defects existing at the outset of the lease fall within the first branch of the warranty.[101] Nevertheless, the court used language which suggests that the first branch of the warranty is limited to latent defects,[102] and that the

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[95]*Id.* at 28, 515 P.2d at 164.

[96]URLTA, *supra* note 4, § 2.104. "Vital interests of the parties and public under modern urban conditions require the proper maintenance and operation of housing. It is thus necessary that minimum duties of landlords and tenants be set forth." *Id.*, Comment.

[97]*Id.* § 1.403(a)(1).

[98]RESTATEMENT DRAFT 1, *supra* note 21, § 5.3 & Comment *c.* It would be against public policy to allow the tenant to accept unsafe or unhealthy premises. *Id.*, Comment *c.*

[99]*Id.* § 5.1, Comment *d.*

[100]The *Restatement* draws an analogy to U.C.C. § 2-302, the unconscionability provision. *Id.* § 5.6, Reporter's Note 2.

[101]"Regardless of which the jury chose, they all were concededly *latent* defects, i.e., *hidden conditions in the premises at the inception of the lease* . . . ." 349 N.E.2d at 775 (emphasis in original).

[102]In discussing the first branch of the warranty, the court twice used the phrase "*warrants* that the leasehold is then free from any latent defects or conditions rendering the premises uninhabitable for residential purposes . . . ." *Id.* at 764, 774 (emphasis in original). And again, in discussing the duty of the landlord to transfer the premises in a reasonably habitable condition and to maintain the premises in a reasonable state of repair for the duration of the term, the court noted that the landlord does not warrant against all minor defects "whether latent or developing after the lease's inception." *Id.* at 780.

second branch of the warranty covers only patent defects arising after the inception of the lease.[103] Of course one could argue that an additional reason the court labelled the defects latent was to avoid problems such as waiver or assumption of the risk which would be raised if the court were to discuss patent defects existing at the inception of the lease.[104]

Another issue arising with regard to the first aspect of the implied warranty is whether the landlord must possess actual or constructive knowledge of the defective condition and be allowed a a reasonable time to remedy that condition before a breach of the warranty of habitability occurs. Since the first aspect is analogous to the implied warranties of fitness of use and merchantability found in the law of sales of goods, the landlord's inability to discover the defect should be irrelevant.[105] The *Restatement*, however, has taken the position that when the landlord can show that he could not have discovered a latent defect by a reasonable inspection of the premises, the tenant must give him notice of the defect and a reasonable opportunity to correct the condition before it can be treated as a breach of the warranty.[106] This position seems to suggest that the landlord must be at "fault" before there can be any breach of the warranty. In most contractual contexts the distinction should prove to be of little importance since the economic loss between the time of discovery and the opportunity to repair should be relatively small. In a tort context, however, the issue may be critical because a latent defect may cause serious personal injury or property damage before the tenant has had an opportunity to notify the landlord of the defective condition.[107]

Finally, even if a court required the tenant to show that the landlord had notice of the defective condition at the inception of the lease or allowed the landlord to raise his inability to discover the defect as a

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[103]"Defects which are not latent, i.e., those arising or developing after the tenant has assumed possession and not present at the lease's inception, are within the second branch of liability under the implied warranty of habitability . . . ." *Id.* at 775 n.36.

[104]This argument is strengthened by the court's use of a passage from Kline v. Burns, 111 N.H. 87, 276 A.2d 248 (1971), in defining the nature of the warranty: *"[A]t the inception of the rental [the landlord warrants] there are no latent [or patent] defects in facilities* vital to the use of the premises for residential purposes . . . ." 349 N.E.2d at 767 (emphasis by the *Old Town* court).

[105]*See* Old Town Dev. Co. v. Langford, 349 N.E.2d at 766; J. WHITE & R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE § 9-6, at 286-88 (1972).

[106]RESTATEMENT DRAFT 1, *supra* note 21, § 5.1, Comment *e*, at 178.

[107]By economic loss in the contractual setting, we mean loss of bargain or like damages and not any personal injury or property damages, which are arguably consequential damages for breach of contract. These latter losses are included under tort recoveries discussed *infra* at 625-32.

defense, in most cases the court would find that the landlord had constructive notice of the condition from his implied affirmation and prior possession of the premises. As noted in *Old Town*, such a holding contains strong overtones of strict liability: "A blurry line separates constructive notice and the imputed notice characteristic of the UCC warranties of merchantability and fitness for a particular purpose . . . and strict products liability in terms of Restatement (Second) of Torts § 402(A)."[108]

(b) Promise of Continued Fitness

With regard to the second branch of the warranty, the duty to repair aspect, the courts recognize that notice to the landlord is an "indispensible [*sic*] prerequisite to liability."[109] This requirement is reasonable since the tenant, not the landlord, is in possession of the premises.[110] The URLTA recognizes the right of the landlord, upon the tenant's consent, to enter the premises for purposes of inspection and repairs, and declares that such consent shall not be withheld unreasonably.[111] Furthermore, in an emergency, or when the tenant is absent for more than seven days or has abandoned the premises, the landlord can enter the premises without the tenant's consent.[112]

Unlike the first branch of the warranty, it is not clear that under the second branch the landlord will be liable for all conditions arising after the making of the lease regardless of the cause. Thus the "fault" concept becomes much more relevant. The cases discussing the issue clearly indicate that the landlord is not liable for conditions caused by the negligent acts or omissions of the tenant.[113] This rule is derived from the contract principle that a person may not benefit from his own wrong.[114]

At common law the risk of loss from casualty or the acts of third persons fell upon the tenant.[115] As long as the tenant still had

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[108]349 N.E.2d at 775 (citations omitted).

[109]*Id.* at 775 n.36.

[110]At common law it was doubtful whether the landlord had a right to enter the premises to inspect or make repairs without an express provision to that effect in the lease. 3A THOMPSON, *supra* note 27, § 1230, at 140. *But see, e.g.*, Talbott v. English, 159 Ind. 299, 59 N.E. 857 (1901). However, such a right would seem necessarily implied from a landlord's duty to maintain the premises in a state of repair. Love, *supra* note 10, at 105.

[111]URLTA, *supra* note 4, § 3.103(a).

[112]*Id.* §§ 3.103(b), 4.203(b) and (c). Special remedies available to both landlord and tenant for abuse of the right of access are provided in § 4.302.

[113]*See, e.g.*, Hinson v. Delis, 26 Cal. App. 3d 62, 102 Cal. Rptr. 661 (1972); King v. Moorehead, 495 S.W.2d 65 (Mo. Ct. App. 1973).

[114]See cases cited in note 113 *supra*.

[115]*See* Talbott v. English, 156 Ind. 299, 59 N.E. 857 (1901).

possession of the land the duty to pay rent continued. Destruction of any structures on the land was not considered to be a failure of consideration.[116] Thus, if the tenant leased a house and lot and the house burned to the ground, the tenant's obligation to pay rent continued for the remainder of the term because he still maintained the use and enjoyment of the "land." The sole exception to the rule occurred when the tenant had leased an apartment without any land conveyed with it.[117] Thus, if the apartment was destroyed by casualty there was a destruction of the subject matter of the lease and the estate terminated.

Presently, approximately half the states have enacted legislation relieving the tenant from the obligation to pay rent when the premises are materially damaged or destroyed by casualty.[118] Several of these statutes also allow the tenant to remain in possession with an abatement in rent if the tenant can still lawfully occupy a portion of the premises.[119] These statutes, however, do not require the landlord to restore or rebuild the premises. There still exists some question whether under the implied warranty of habitability the landlord might be required to restore to a habitable condition premises damaged or destroyed by casualty or the acts of third persons. The language in several cases suggests that the landlord's duty to maintain the premises in a habitable condition is limited to the performance of routine maintenance, *i.e.*, a duty to prevent the premises from becoming uninhabitable through normal wear and tear.[120] However, in at least one case, *Key 48th Street Realty Co. v. Munez*,[121] the landlord was required to restore an apartment which was totally destroyed by fire. It should be noted, however, that in *Munez* the building itself was less than twenty-five percent destroyed, there was no major structural damage, and there was at least partial fire insurance coverage. It can be argued that such damage is foreseeable and that the landlord should be required to carry casualty insurance.[122]

The URLTA does not specifically address the risk of loss issue, although it does contain a provision allowing the tenant to terminate the estate in the event the dwelling unit is damaged or destroyed by fire or other casualty or, if continued occupancy is lawful, to continue

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[116]*See, e.g.*, Womack v. McQuarry, 28 Ind. 103 (1867).

[117]Moran v. Miller, 198 Ind. 429, 153 N.E. 890 (1926); Womack v. McQuarry, 28 Ind. 103 (1867).

[118]RESTATEMENT DRAFT 1, *supra* note 21, Statutory Note para. 2a to ch. 5, at 168-69.

[119]*Id.* para. 3c.

[120]*E.g.*, Marini v. Ireland, 56 N.J. 130, 265 A.2d 526 (1970).

[121]174 N.Y.L.J. 17 (Civ. Ct. Sept. 22, 1975).

[122]*Id.*

in possession of the habitable portion of the premises with the rent reduced in proportion to the diminution of the fair rental value of the dwelling unit.[123] Because a specific clause on casualty was included, it can be assumed that the other provisions of the Act were not intended to apply to conditions resulting from casualty.

The *Restatement* is more specific and clearly relieves the landlord of liability for conditions arising from the fault of the tenant, the consequences of a sudden non-manmade force, or the conduct of third persons.[124] In other words, the landlord's liability is limited to "fault." If a condition occurs which renders the premises uninhabitable after the lease is made but before the tenant takes possession, the tenant had no remedy other than to terminate the lease, unless the condition was the fault of the landlord.[125] If the condition occurs after the tenant is in possession, the tenant may still terminate if the condition is the result of a sudden non-manmade cause,[126] but has no remedy against the landlord if the condition is caused by the act of a third person.[127]

Placing the risk of loss from casualty or the acts of third persons on the landlord would be a heavy burden. Often the landlord might lack the funds to restore the structure, or it might be economically impractical to rebuild. To permit an action for specific performance or damages seems unduly harsh since the landlord was in no way responsible for the loss. On the other hand, the tenant is as free from fault as the landlord and it would be equally unfair to require the tenant to continue paying rent after the premises have been destroyed. As suggested by the URLTA and the *Restatement*, the tenant should be allowed to terminate the estate even though the landlord has not breached the warranty of habitability. The landlord could protect his reversionary interest and any loss of rent by insurance, and could bring suit against any third person responsible for the loss.

3. Contractual Remedies

The recognition of an implied warranty of habitability in residential leases would be of little value to the tenant had the courts

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[123]URLTA, *supra* note 4, § 4.106.

[124]RESTATEMENT DRAFT 1, *supra* note 21, § 5.4, Comment *f* at 205, Comment *h* at 206-07, Comment *i* at 207.

[125]*Id.* § 5.2.

[126]*Id.* § 5.4. The *Restatement* limits the tenant's remedy to termination of the lease because it would be unfair to burden the landlord with other remedies when he is not formally at fault. *Id.*, Comment *f* at 205 and Reporter's Note 11a at 213. Sudden non-manmade forces would include the collapse of a floor caused from termite infestation which did not exist at the date of the lease. *Id.*, Comment *e*, Illustration 7 and Comment *f* at 205.

[127]RESTATEMENT DRAFT 1, *supra* note 21, § 5.4, Comment *i* at 207.

not at the same time also recognized the contractual nature of the lease, thereby opening up an entirely new range of remedies to the tenant. Of course, the warranty of habitability is based on the similarity between consumer and landlord-tenant transactions, so to recognize a contractual right without providing contractual remedies would be totally inconsistent.[128]

Since *Old Town* involved an action for personal injuries and property damage resulting from the breach of the implied warranty, the court was not particularly concerned with contractual remedies. Nevertheless, in rejecting the doctrine of caveat lessee, the court concluded: "In summary then we have rejected *caveat* lessee and have found that an apartment (residential) lease is essentially contractual in nature carrying with it *mutually dependent covenants* including an implied warranty of habitability and the *full range of remedies* for breach of contract . . . ."[129] At another point the court elaborated on this full range of remedies: "The warranty of habitability as developed to date is a covenant implied in residential leases, the breach of which invokes the full range of contract remedies . . . *damages*, rescission, specific performance, reformation, and rent abatement."[130]

(a) Termination

At common law there was no implied warranty of habitablity or duty on the part of the landlord to maintain the premises in a habitable condition, and so the tenant could not terminate the lease because the premises were uninhabitable. The recognition of the warranty of habitability now creates such a duty on the landlord and gives the tenant the right to terminate the lease if the duty is breached.[131]

However, at common law the tenant did possess the right to terminate the lease if the landlord breached an express convenant to repair and the lack of repair materially affected the tenant's use and enjoyment of the land.[132] So in reality the implied warranty operates like an express convenant to repair at common law, permitting the tenant to treat the breach of warranty as a constructive eviction. In fact, in several of the earlier cases recognizing the implied warranty of habitability in residential leases the tenants had vacated the

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[128]Love, *supra* note 10, at 108.

[129]349 N.E.2d at 764 (emphasis added).

[130]*Id.* at 761 (emphasis in original).

[131]*See, e.g.*, Marini v. Ireland, 56 N.J. 130, 265 A.2d 526 (1970), and text accompanying note 45 *supra.*

[132]See discussion *supra* at 597-98.

premises on the theory of constructive eviction.[133] Thus, the contractual remedy of termination (rescission) adds little to the real property remedy of constructive eviction[134] and also suffers from the same inadequacies.[135]

(b) Damages

Damages have always been available to the tenant when the landlord has breached a covenant in the lease.[136] Unfortunately, until recently there were no implied warranties, and the landlord seldom made an express covenant to maintain the premises in a habitable condition. This problem has now been remedied by the implied warranty of habitability in residential leases.

When the tenant terminates the lease by vacating the premises and sues the landlord for breach of his implied warranty of habitability, the courts are agreed that the measure of damages is the difference between the fair rental value of the premises for the unexpired term of the lease and the rent owed by the tenant for the unexpired term, *i.e.*, the tenant's loss of bargain.[137] If the tenant remains in possession, however, the courts are not in agreement as to the proper measure of damages.[138] The standard contract measure of damages for breach of warranty when the party accepts a non-conforming performance is the difference between the value of the performance as warranted and the value of the performance as received[139]—the difference between the value of the premises as warranted and the value of the premises in their present uninhabitable condition. While some courts have applied the standard contract measure of damages,[140] other courts have applied a different measure of damages—the difference between the agreed rent under the lease and the fair rental value of the premises in their present condition.[141]

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[133]*E.g.*, Pines v. Perssion, 14 Wis. 2d 590, 111 N.W.2d 409 (1961) (college students vacated premises because of housing code violation; court held there was a failure of consideration, absolving students from rent liability under the lease and imposing rent liability only for reasonable rental value of premises during actual occupancy).

[134]See the discussion of the remedy of constructive eviction in Lemle v. Breeden, 51 Haw. 426, 462 P.2d 470 (1969).

[135]*Id.*

[136]*See* note 31 *supra* and accompanying text.

[137]*See, e.g.*, Boston Housing Auth. v. Hemingway, 363 Mass. at 203 & n.21, 293 N.E.2d at 845 & n.21 (1972); King v. Moorehead, 495 S.W.2d at 76 (Mo. Ct. App. 1973).

[138]*See* Note, *The Great Green Hope: The Implied Warranty of Habitability in Practice*, 28 STAN. L. REV. 729, 759-61 (1976) [hereinafter cited as *The Great Green Hope*].

[139]*E.g.*, U.C.C. § 2-714(2).

[140]*E.g.*, Green v. Superior Court, 10 Cal. 3d 616, 638, 517 P.2d 1168, 1183, 111 Cal. Rptr. 704, 719 (1974); Mease v. Fox, 200 N.W.2d 791, 797 (Iowa 1972).

[141]*E.g.*, King v. Moorehead, 495 S.W.2d 65, 76 (Mo. Ct. App. 1973).

This conflict appears to be due, in part, to the language in several of the decisions first recognizing the warranty of habitability. In these cases the tenants had vacated the premises without paying rent for the time in possession. In actions by the landlords for unpaid rent, the courts held the landlords were entitled to the reasonable rental value of the premises for the time the tenants were in actual possession. Obviously the tenants had chosen to rescind the lease and in returning the parties to their status quo the courts awarded the landlords the reasonable value of their performance.[142]

In later years, when the tenant remained in possession of the premises rather than rescinding and the landlord sued for rent, the courts continued to talk in terms of quantum meruit recovery. The tenant was no longer liable for the reserved rent but was still obligated to pay the reasonable rental value of the premises in their present condition. It was only a small misstep to thus conclude that "the tenant's damages are reasonably measured by the difference between the agreed rent and the fair rental value of the premises as they were during occupancy by the tenant in the unhealthy or unsafe condition."[143] Thus, these courts have applied a rent abatement measure of damages determined by the difference between the agreed rent and the fair rental value of the premises in their present condition.[144] Under this rule the tenant would not recover his loss of bargain.

The *Restatement* has created a compromise position: "[T]he amount of the abatement is to that portion of the rent which the fair rental value after the event giving the right to abate bears to the fair rental value before such event."[145] By way of example, suppose a tenant leases a dwelling, with a rental value as warranted of $250 a month, for $200 a month, but in its present uninhabitable condition the dwelling has a fair rental value of only $150 a month. If the tenant remains in possession he receives a part performance worth $150, but if the premises had been as warranted he would have received a performance worth $250. Under the standard measure of damages the tenant's loss of bargain would be $100—the difference between

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[142]*E.g.*, Lemle v. Breeden, 51 Haw. 426, 462 P.2d 470 (1969); Reste Realty Corp. v. Cooper, 53 N.J. 444, 251 A.2d 268 (1969); Pines v. Perssion, 14 Wis. 2d 590, 111 N.W.2d 409 (1961).

[143]King v. Moorehead, 495 S.W.2d at 76, *citing* Kline v. Burns, 111 N.H. 87, 276 A.2d 248 (1971) and Pines v. Perssion, 14 Wis. 2d 590, 111 N.W.2d 409 (1961). It should be noted, however, that in the cited portions of *Kline* and *Pines* only the landlord's loss was considered; thus, the cases were improper authority for calculating the loss a tenant encounters by substandard housing.

[144]*See The Great Green Hope*, *supra* note 138, at 760.

[145]RESTATEMENT (SECOND) OF PROPERTY, LANDLORD AND TENANT § 10.1 (Tent. Draft No. 2, 1974) [hereinafter cited as RESTATEMENT DRAFT 2].

what he should have received ($250) and what he actually received ($150). Under the rent abatement theory he would be required to pay only $150 as rent. However, since the rent was $200 he has only recovered $50 as damages—the difference between the agreed rent ($200) and the fair rental value ($150). Under the *Restatement* rule the amount the tenant must pay as the abated rent is to the rent ($200) what the present rental value ($150) is to the fair rental value as warranted ($250). Thus the formula for calculating the abated rent would be: x/200 = 150/250, thus x = $120. Under this rule the tenant would receive $80 as damages, thereby granting him a percentage of his loss of bargain.

There has been some concern expressed that the cost of establishing, by expert testimony, the fair rental values of premises as warranted and in their present condition is too expensive and, at best, highly speculative.[146] One solution suggested in several cases is a "percentage reduction of use" measure of damages.[147] Under this theory one would reduce or abate the rent in proportion to the diminution of the use and enjoyment of the premises. While perhaps less expensive it is no more precise than the difference in value measure of damages and is in reality based on a "gut reaction" as to the extent of damages.[148]

Perhaps the courts have been reluctant to apply the traditional contract measure of damages for breach of warranty in landlord-tenant cases because in the lease of substandard housing an "implied warranty of habitability" was never contemplated or intended by the parties.[149] The defects are patent, so the tenant accepts the premises "as is" with full knowledge of their defective condition and with no expectation that the landlord will correct them. Likewise, the rent agreed upon in the lease is based upon the fair rental value of the premises in their defective condition, which is far below the rental value of the premises had they met the standard of habitability and fitness of use suggested by a warranty of habitability.[150] Thus, if a court refused to find that the tenant had "waived" patent defects because it is against public policy to allow a tenant to live in unsafe or unhealthy housing, and then applied the standard measure of

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[146]*See* Moskovitz, *supra* note 24, at 1468-70; *The Great Green Hope, supra* note 138, at 762 & n.156.

[147]Green v. Superior Court, 10 Cal. 3d 616, 639 n.24, 517 P.2d 1168, 1183 n.24, 111 Cal. Rptr. 704, 719 n.24 (1974); Academy Spires, Inc. v. Brown, 111 N.J. Super. 477, 486, 268 A.2d 556, 562 (1970).

[148]Moskovitz, *supra* note 24, at 1468-70; *The Great Green Hope, supra* note 138, at 762, 764-66.

[149]*See* Samuelson v. Quinones, 119 N.J. Super. 338, 291 A.2d 580 (1972).

[150]*The Great Green Hope, supra* note 138, at 763-64.

damages for breach of warranty, it is conceivable that the landlord might have to pay the tenant to live in the substandard dwelling.[151]

If the above rule were strictly applied it would certainly discourage the leasing of substandard dwellings, but the ultimate result might be that the poor would be forced to sleep under bridges instead of in unsafe and unhealthy houses.[152] One solution is to return to the illegal contract theory suggested in *Brown v. Southhall Realty Co.*[153] *Brown* and several other cases[154] have held that when the landlord leases a dwelling knowing that it is not in compliance with local housing code regulations the lease is null and void. This theory has now fallen into disuse because of the recognition of the implied warranty of habitability.[155] Its revival should be considered with caution and applied only when both parties are *in pari delicto*—where both the landlord and tenant have contracted with full knowledge of housing code defects and have negotiated the lease, including the rent, on the basis of the uninhabitable conditions.[156] To do

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> [I]f the value as warranted is $150, the contract rent is $60, and the fair rental value of the premises in its actual condition is $50, damages under the difference in value rule would be . . . $100. Therefore, the reasonable rental value would be equal to the contract rent ($60) less damages ($100), or -$40 . . . forcing the landlord to pay a tenant $40 per month to live in the premises worth $50 a month.

The Great Green Hope, supra note 138, at 764 n.162.

[152]Meyers, *The Covenant of Habitability and the American Law Institute*, 27 STAN. L. REV. 879, 889-97 (1975); King v. Moorehead, 495 S.W.2d 65, 79 (Mo. Ct. App. 1973). At the present time there is considerable disagreement concerning the effect of habitability laws on the housing market. For an excellent discussion of the problem see Hirsch, Hirsch & Margolis, *Regression Analysis of the Effects of Habitability Laws Upon Rent: An Empirical Observation on the Ackerman-Komesar Debate*, 63 CAL. L. REV. 1098 (1975). For this reason we suggest that the courts proceed with caution in applying the warranty of habitability to patent defects existing in substandard housing when both the landlord and the tenant are *in pari delicto*.

[153]237 A.2d 834 (D.C. Ct. App. 1968).

[154]*E.g.*, Shephard v. Lerner, 182 Cal. App. 2d 746, 6 Cal. Rptr. 433 (1960); King v. Moorehead, 495 S.W.2d 65 (Mo. Ct. App. 1973).

[155]See Moskovitz, *supra* note 24, at 1454.

[156]As noted by Professor Moskovitz, if it is illegal to lease premises with existing housing code violations, then the tenant's knowledge of the violations is immaterial. *Id.* at 1452-53. Thus, to require the tenant be *in pari delicto* may appear illogical. However, we are not suggesting that the tenant could not raise this defense when he is not *in pari delicto*, although it is most unlikely that he would choose to do so since the defense affords the tenant less protection than the implied warranty of habitability defense. King v. Moorehead, 495 S.W.2d 65, 79 (Mo. Ct. App. 1973). *But see* Moskovitz, *supra* note 24, at 1454. Rather we are suggesting that the illegal contract theory would be the tenant's sole defense when he is *in pari delicto*. We do so with full knowledge that this will deny the poor tenant a habitable dwelling, but to force the landlord either to comply with the housing codes or to take the premises off the housing market could be even more detrimental to the tenant. See note 152 *supra*. By applying the illegal

otherwise would deprive the tenant of his contractual remedies, including loss of bargain, where he actually has relied upon an implied warranty of habitability. Under the illegal contract theory, the lease is void and the tenant becomes a tenant at will. Later decisions point out that the tenant is not permitted to live rent free and that the landlord may recover the reasonable rental value of the premises in quantum meruit.[157] Holding such contracts illegal avoids rent gouging of the poor because the landlord's recovery is limited to the reasonable rental value of the premises, while at the same time the tenant is prevented from taking undue advantage of the situation by attempting to recover damages for breach of a warranty of habitability. Of course, nothing should prevent the tenant from filing a complaint with the proper code enforcement agency; if the landlord then evicts the tenant for reporting the housing code violations the tenant can claim retaliatory eviction.[158]

Finally, with regard to the recovery of consequential damages one should keep in mind that recognition of the remedy of rent application, the right of the tenant to repair minor defects and deduct the cost of the repair from the rent due and owing, might bar recovery of damages which could have been avoided by the tenant. The Indiana decisions recognizing the right to repair and deduct have specifically held that when the cost of repairs is small and the potential damage from nonrepair great, the tenant has a duty to mitigate his damages by making the repairs, and cannot recover consequential damages which he could have avoided.[159] Failure to

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contract theory we afford the tenant limited protection while at the same time giving the landlord an incentive to remain in business. Likewise, a court will be far less likely to hold the tenant has "waived" patent defects under the implied warranty of habitability theory. See notes 92-100 *supra* and accompanying text. Finally, by applying the warranty of habitability to all other dwellings we prevent them from becoming slums, and, in time, the habitable dwellings will "filter down," middle class tenants will "move up" as new housing is built, and the poor tenants will obtain habitable dwellings without the short range problem. Of course, we realize that slums are a blight on the community, contribute to crime and juvenile delinquency, and increase the taxes of conscientious landowners. Foisy v. Wyman, 83 Wash. 2d 22, 28, 515 P.2d 160, 164 (1973); Pines v. Perssion, 14 Wis. 2d 590, 596, 111 N.W.2d 409, 412 (1961). But there simply are no easy solutions.

[157]William J. Davis, Inc. v. Slade, 271 A.2d 412 (D.C. Ct. App. 1970); King v. Moorehead, 495 S.W.2d 65 (Mo. Ct. App. 1973).

[158]*See* Robinson v. Diamond Housing Corp., 463 F.2d 853 (D.C. Cir. 1972), *rev'g* 267 A.2d 833 (D.C. Ct. App. 1970). After Mrs. Robinson had successfully raised the illegal contract theory as a defense to an action for possession for nonpayment of rent, the landlord sought to take the property off the housing market. The District of Columbia Court of Appeals held the landlord had a right to do so and evict Mrs. Robinson; however, the United States Court of Appeals reversed, holding the landlord could not take the premises off the market if the purpose were to punish Mrs. Robinson.

[159]See notes 166-68 *infra* and accompanying text.

repair minor defects may also raise the issue of assumption of risk in an action for personal injuries or property damage against the landlord.

(c) Repair and Deduct (Rent Application)

Since the covenant of repair and the covenant to pay rent were considered to be independent covenants at common law, courts did not recognize the right of the tenant to make repairs and deduct the cost from the rent even though the landlord had breached his convenant to repair. The tenant was forced to continue to pay the full amount of the reserved rent and to sue the landlord in a separate action for damages. Actually, if the landlord brought an action for the rent, most courts would allow the tenant to set off the cost of the repairs from the rent. However, the landlord usually chose to treat the failure to pay rent as a forfeiture and brought an action for possession under the local FED statute for nonpayment of the rent. Under the summary procedure of the FED statutes the tenant was not permitted to raise a counterclaim or setoff as a defense because the only issue to be resolved was whether rent was, in fact, due and owing. That issue would be decided against the tenant because the breach of the covenant by the landlord did not relieve the tenant of the duty to pay the rent. Thus, the problem was procedural as well as substantive; the tenant might have a right to set off the cost of repairs from the rent but if he attempted to do so he could be evicted.

To remedy this situation a number of states enacted legislation authorizing the tenant to make repairs and deduct the cost from the rent if the landlord was in breach of his covenant to repair.[160] Unfortunately, however, most of these statutes were of little value to the tenant because they placed severe limitations on the type and extent of the repairs which could be made, often limiting the cost of repairs to $100 or one month's rent.[161] In addition, most of the early statutes, as construed, permitted waiver of the right by the tenant,[162] and in the standard lease the landlord made sure that it was waived.

Because of the dissatisfaction with the remedy of constructive eviction and the recognition of the doctrine of mutual dependency of covenants, several courts have recently reached the remedy of rent application without the aid of a statute. In *Marini v. Ireland*,[163] the New Jersey Supreme Court recognized the right of a tenant to repair

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[160]For a list and brief discussion of rent application statutes see RESTATEMENT DRAFT 2, *supra* note 145, Statutory Note to § 10.2, at 268-70.

[161]*Id.*

[162]*Id.* Reporter's Note to § 10.2 at 272-73.

[163]56 N.J. 130, 265 A.2d 526 (1970).

a broken toilet and offset the cost of the repairs against the rent. In *Marini* the court noted:

> It is of little comfort to a tenant in these days of housing shortage to accord him the right, upon a constructive eviction, to vacate the premises and end his obligation to pay rent. Rather he should be accorded the alternative remedy of terminating the cause of the constructive eviction where as here the cause is the failure to make reasonable repairs.[164]

A New York court reached the same result in an almost identical factual situation.[165] It is interesting to note that in both these cases the landlord's duty to repair was based on the implied warranty of habitability rather than an express covenant to repair.

In 1965, the Indiana Court of Appeals in *Rene's Restaurant Corp. v. Fro-Du-Co Corp.*,[166] recognized the remedy of rent application without the aid of a statute or a reevaluation of the common law of landlord-tenant. The historical development of this remedy in Indiana is extremely interesting. In several early cases involving suits by tenants against their landlords for breaches of the covenant to repair, the courts held that the tenants could not recover consequential damages which they could have avoided.[167] In discussing the duty of the tenant to mitigate his damages the courts concluded that when the cost of repairs is "trifling" and the potential damage from nonrepair great, the tenant has a duty to make the repairs himself, and if he fails to do so, he cannot recover any special damages resulting from the landlord's failure to repair.[168] Thus, the "right" of the tenant to repair a defective condition himself, when the landlord, after notice and a reasonable time to make the repairs, has failed to comply with his obligations under a covenant to repair, began as a "duty" to mitigate damages.[169]

In passing, the courts noted that the tenant could sue the landlord for the cost of the repairs or set off the cost of such repairs in an action by the landlord for rent. This was not, of course, the same as suggesting that the tenant could deduct the cost of the repairs from the rent due and owing or that payment by the tenant could be raised as a defense in a summary proceeding by the landlord for possession under Indiana's FED statute. Nevertheless, the court in *Rene's*

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[164]*Id.* at 146, 265 A.2d at 535 (citation omitted).

[165]Jackson v. Rivera, 65 Misc. 2d 468, 318 N.Y.S.2d 7 (N.Y. Civ. Ct. 1971).

[166]137 Ind. App. 599, 210 N.E.2d 385 (1965).

[167]Hendry v. Squier, 126 Ind. 19, 25 N.E. 830 (1890); Olinger v. Reahard, 117 Ind. App. 172, 70 N.E.2d 436 (1947); Hamilton v. Feary, 8 Ind. App. 615, 35 N.E. 48 (1893).

[168]*See* cases cited note 167 *supra.*

[169]*Id.*

Restaurant held that when the landlord has agreed to repair and fails to do so, the tenant may make the repairs himself and deduct the cost from the rent.[170] Thus, if the tenant has paid the balance of the rent after deduction for repairs to the landlord, the tenant would have a defense to an action for possession.

One can argue that allowing the introduction of setoffs and counterclaims destroys the summary nature of the action for possession. On the other hand, it can be viewed simply as a limited recognition of the doctrine of dependent covenants. The breach of a dependent covenant by the landlord is directly related to the tenant's obligation to pay rent and thus goes directly to the issue of whether rent is actually owing.[171] As such, it does not unduly complicate the summary procedure since it is merely evidence relevant to the sole issue.

Another question involves the type and extent of repairs authorized in Indiana under the rent application remedy. Unlike the statutes permitting rent application, the courts have not set any specific limits concerning the cost of repairs which can be made and offset by the tenant. However, such words as "small" and "trifling" suggest that the repairs must be reasonable in light of the value of the leasehold and cannot exceed the value of the rent payable for the term.[172] While the Indiana cases recognizing the remedy of rent application have all involved an express covenant to repair, there is no logical reason why the remedy should not be recognized in a situation involving an implied duty to repair under the warranty of habitability.

(d) Rent Abatement and Rent Withholding

Rent abatement and rent withholding are entirely separate and distinct remedies. Rent withholding merely authorizes the tenant to withhold the rent while the landlord is in default of his obligations under the lease. It does not address the question of whether the landlord is entitled to all the rent withheld once he has remedied the

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[170] 137 Ind. App. at 563-64, 210 N.E.2d at 387. The tenant had withheld the cost of repairs ($268.40) from the rent due and owing ($338.04) and submitted a check for the balance along with a receipt for the repair costs.

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> Since the affirmative defense of breach of implied warranty of habitability goes directly to the issue of rent due and owing, which is one of the basic issues in an unlawful detainer action . . . , we now hold said defense is available in an unlawful detainer action of this nature.

Foisy v. Wyman, 83 Wash. 2d 22, 31-32, 515 P.2d 160, 166 (1973) (citation omitted).

[172] *See, e.g.*, Rene's Restaurant Corp. v. Fro-Du-Co Corp., 137 Ind. App. 559, 210 N.E.2d 385 (1965); Marini v. Ireland, 56 N.J. 130, 265 A.2d 526 (1970).

default.[173] Rent abatement, on the other hand, is a recognition that the covenants in a lease are mutually dependent and that the tenant should not be required to pay the full amount of the reserved rent while the landlord is in default of his obligations under the lease. This does not, however, necessarily authorize the tenant to withhold all of the rent during the time the landlord is in default.[174]

A number of states have enacted rent withholding statutes which provide that the tenant may withhold rent when the premises do not comply with local health and housing codes. These statutes were adopted because the criminal sanctions used for housing code enforcement proved ineffective in eliminating substandard housing.[175]

The rent withholding statutes vary considerably but in general they provide that the premises must be certified as uninhabitable by the governmental agency charged with code enforcement before the tenant is authorized to withhold the rent.[176] Also, there are provisions requiring the rent be paid into the court or deposited in an escrow account. Some of the statutes allow funds to be used by the landlord or the code enforcement agency to correct the deficiencies, and others permit the landlord to reach these funds to pay certain expenses such as taxes, utilities, and mortgage payments if irreparable harm would otherwise result.[177]

Several decisions, most notably *Javins v. First National Realty Corp.*,[178] have suggested that a total breach of the warranty of

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[173]These rights are often clarified by statute, however. Pennsylvania's rent withholding statute, for example, provides that the landlord is entitled to all rent held in the escrow account if he corrects the defect within six months; otherwise, all money is to be returned to the tenant. PA. STAT. ANN. tit. 35, §§ 1700-01 (Purdon Supp. 1976-77). For a discussion of this law, see Clough, *Pennsylvania's Rent Withholding Law*, 73 DICK. L. REV. 583, 584 (1969).

[174]Some decisions suggest that the landlord may evict the tenant for non-payment of rent if too much is withheld leaving some rent due and owing. *See, e.g.*, Jack Spring, Inc. v. Little, 50 Ill. 2d 351, 280 N.E.2d 208 (1972), *as interpreted in* Lehndorff USA (Central) Ltd. v. Cousins Club, Inc., 40 Ill. App. 3d 875, 353 N.E.2d 171 (1976); Foisy v. Wyman, 83 Wash. 2d 22, 515 P.2d 160 (1973).

[175]Grad, *supra* note 60, at 125-38.

[176]For a list of these statutes, see RESTATEMENT DRAFT 2, *supra* note 145, Statutory Note to § 10.3 at 277-79.

[177]Similar in their results to rent withholding statutes are receivership statutes which permit the sovereign to take possession of unsafe premises and use the rents and income for repairs. *See, e.g.*, IND. CODE § 18-5-5.5-15 (Burns 1974). For broad provisions relating to housing code standards and enforcement in Indiana, see *id.* §§ 18-5-5-1 to -12; 18-5-5.5-1 to -20. If a landlord permits his property to become uninhabitable, he cannot be assured of continued operation with reduced rental. Instead, the sovereign may cause vacation of the premises resulting in loss to the landlord. *See* City of Gary v. Ruberto, 354 N.E.2d 786 (Ind. Ct. App. 1976).

[178]428 F.2d 1071, 1082-83 (D.C. Cir. 1971).

habitability suspends the tenant's obligation to pay rent,[179] a judicial rent suspension doctrine. This doctrine appears somewhat questionable under contract law because continued possession of the premises by the tenant results in continued part performance by the landlord. Even under the doctrine of dependent covenants one party is not relieved of his duty to perform unless the other party's performance is worthless.[180] One might argue that the courts are concluding that when the premises are uninhabitable the landlord's performance is worthless, but the courts have held that when the obligation to pay rent is only "partially suspended" the tenant must pay the back rent found owing to the landlord within a reasonable time in order to avoid eviction.[181] Similar language is found in the URLTA which allows the tenant to raise the landlord's noncompliance with the warranty of habitability as a defense to an action for possession, and unless the claim is without merit, gives the tenant a reasonable time to pay any rent found due and owing in order to prevent a judgment for possession.[182]

There are several major problems with the doctrine of rent suspension. First, there is no requirement of an impartial determination made by a governmental agency before the tenant is permitted to withhold the rent. Normally the doctrine of rent suspension will be raised as a defense in an action by the landlord for possession of the premises for nonpayment of rent. This will then require a judicial determination as to whether the obligation to pay rent has in fact been suspended. In the meantime, the landlord is not receiving any income which in turn leads to the second problem. It is very unlikely that the tenant will voluntarily set up an escrow account to pay the money into court. Some commentators have expressed the fear that an insolvent or judgment-proof tenant may take advantage of the situation by claiming a breach of the warranty of habitability in order to obtain a few months of rent-free possession.[183] One solution to this problem is for the court to issue a protective order requiring the tenant to pay all or a portion of the rent into court pending adjudication of the controversy. While only one decision has suggested that the tenant will be required to deposit the rent *in custodia legis* when this defense is raised,[184] a number of

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[179]*Id.*

[180]*See* J. CALAMARI & J. PERILLO, THE LAW OF CONTRACTS § 159 (1970).

[181]*See, e.g.*, Javins v. First Nat'l Realty Corp., 428 F.2d at 1083; Green v. Superior Court, 10 Cal. 3d 616, 639, 517 P.2d 1168, 1184, 111 Cal. Rptr. 704, 720 (1974).

[182]URLTA, *supra* note 4, § 4.105. The same rule applies to the landlord's noncompliance with the rental agreement. *Id.*

[183]*E.g., The Great Green Hope, supra* note 138, at 742-43.

[184]King v. Moorehead, 495 S.W.2d at 77.

courts have indicated their willingness to issue a protective order under the proper circumstances.[185]

The remedy of rent abatement recognizes that the covenant to pay rent and the warranty of habitability are mutually dependent, and that the tenant should not be required to pay the full amount of the reserved rent while the landlord is in default under the lease. This does not mean, however, that the tenant can withhold all the rent. The problems then are to determine the proper amount of rent which may be withheld, and the consequences if the tenant withholds too much.

If the tenant withholds any rent it is likely that the landlord will bring an action for possession under the FED statute. Even if such summary procedure does not allow counterclaims or setoffs to be raised as a defense, it appears that the landlord's breach of a dependent covenant is relevant to the issue of whether or not rent is in fact owing.[186] Thus, if the tenant's damages from the landlord's breach of the warranty plus the abated rent paid to the landlord are equal to or greater than the reserved rent, the court should find that no rent is owing and the action for possession should be dismissed. On the other hand, if the court finds that any rent is still owing then logically it should grant the judgment for possession, a result reached by several courts.[187] Thus, it may be risky for the tenant to withhold any rent unless the jurisdiction follows the *Javins* theory of rent suspension or permits the tenant a reasonable time to pay the additional rent found due and owing as indicated by the URLTA.

Since it is not clear whether Indiana would allow a tenant a reasonable time to pay rent found due and owing, it is advisable for the tenant to pay the reserved rent into court pending determination of the amount of nonabatable rent. The *Restatement* would permit a tenant to pay the money into an escrow account and such payments would serve as an absolute defense to an action for possession.[188]

It should be noted that there is no constitutional objection to treating the covenants as independent.[189] Consequently, the tenant could be evicted if he failed to tender the full amount of the reserved rent even though the landlord had breached the covenant of habitability. However, such a position would be illogical, because to recognize the contractual concept of a warranty of habitability and at the same time to reject the doctrine of dependent covenants would be to create a right without a remedy.[190]

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[185]*See, e.g.*, Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1083 n.67 (D.C. Cir. 1970); Hinson v. Delis, 26 Cal. App. 3d 62, 71, 102 Cal. Rptr. 661, 666 (1972).

[186]*See* note 171 *supra*.

[187]*See* cases cited in note 174 *supra*.

[188]RESTATEMENT DRAFT 2, *supra* note 145, § 10.3, Comment *e*.

[189]Lindsey v. Normet, 405 U.S. 56 (1972).

[190]Love, *supra* note 10, at 108.

(e) Specific Performance

Although a number of courts have listed specific performance as one of the contractual remedies available to the tenant for breach of the warranty of habitability,[191] the authors have found only one decision applying this remedy to cure a major defective condition in the premises.[192] It should be noted, however, that the remedy of repair and deduct is a limited form of self-help specific performance which can be used to correct minor defects. Likewise, rent withholding and receivership statutes which permit the rent paid into escrow to be used to make repairs are another type of specific performance.

It has been suggested that the courts are reluctant to utilize this remedy because of the burden of supervision which would be thrust upon the courts.[193] But perhaps the courts are merely mindful of the economic unfeasibility of bringing many substandard structures up to code standards.[194] While some commentators have concluded that specific performance is the only remedy which will insure decent housing,[195] others have observed that strict code enforcement could result in no housing at all for the poor.[196] Thus the reluctance of the courts to apply enforcement remedies such as specific performance may be due to judicial uncertainty as to the impact of vigorous code enforcement on the housing market, and the fear of making a bad situation worse.

4. Tort Remedies

It would be presumptuous to attempt to elaborate on Professor Love's comprehensive article on the landlord's tort liability for

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[191]*E.g.*, Javins v. First Nat'l Realty Corp., 428 F.2d at 1082 n.61; Old Town Dev. Co. v. Langford, 349 N.E.2d at 761.

[192]Key 48th Street Realty Co. v. Muney, 174 N.Y.L.J. 17 (Civ. Ct. Sept. 22, 1975).

[193]*Beyond URLTA*, *supra* note 4, at 29-30; Moskovitz, *supra* note 24, at 1492.

[194]In one extreme situation the cost of bringing two buildings up to housing code standards would have been $42,000, although the two buildings were valued at less than $30,000. Gribetz, *Housing Code Enforcement in 1970—An Overview*, 3 URBAN LAW. 525, 528-29 (1971). Often the landlord is operating on a very small margin of profit and because of the age and location of the structure he could never hope to recover the cost of repairs from the rent even if he could obtain the financing necessary to make them. Meyers, *supra* note 152, at 889-97.

[195]*See, e.g.*, *Beyond URLTA*, *supra* note 4, at 27-29. The remedy of repair and deduct is usually limited to an amount too small to correct major defects. *Id.* at 28. Likewise, rent abatement may provide little incentive to make repairs because the courts will allow the landlord to recover the reasonable rental value of the premises in their defective condition and, in the case of substandard housing, there is often little or no difference between the reserved rent and the actual value. Hirsch, *supra* note 152, at 1110 n.50.

[196]*See* note 152 *supra* and accompanying text.

defective premises.[197] For this reason this discussion will focus on the present state of the law in Indiana as set forth in *Old Town.*

The action was brought against Old Town Development Co., the builder-lessor, and Joe Ogle, the supplier-installer of the apartment heating system, by the tenant, Langford, individually for personal injuries, property damage, and the wrongful death of his two children, and as administrator of his wife's estate for the wrongful death of his wife which resulted from a fire in their apartment. Expert testimony established that the fire resulted from defects in the heating system. An inspection after the fire revealed a deteriorated section of a flue vent in close proximity to wooden joists at the point of origin of the fire. Further, in direct violation of the local building code and the manufacturer's own specifications, the flue vent was too near the wooden joist, a condition which could have been discovered only by an inspection at the "rough-in stage" of the construction of the apartment unit. The evidence also established that all repairs and maintenance of the furnace were handled by Old Town and not the tenant. After hearing the evidence the trial judge instructed the jury on three separate theories of liability: (1) breach of an implied warranty of habitability; (2) negligence, including negligence based on res ipsa loquitur; and (3) strict liability in tort based upon the defective heating system. Pursuant to these instructions the jury returned a verdict against Old Town in the amount of $505,500, and Old Town appealed.

The court of appeals began by rejecting the landlord's common law tort immunity for personal injury and property damage resulting from the condition of the premises on the ground that such a doctrine is inconsistent with the recognition of an implied warranty of habitability.[198] Having rejected tort immunity the court was immediately faced with the issue of "what becomes the basis of the landlord's liability for personal injury and personal property damages."[199]

In light of the rejection of the landlord's tort immunity and the establishment of an implied warranty of habitability in residential leases, Judge Buchanan found two separate bases for the landlord's liability:

> Upon a *breach* of this warranty . . ., a landlord is liable to his tenant (1) for all damages available under traditional remedies for breach of contract . . . including any consequential damages within *Hadley v. Baxendale* guidelines; and (2) for

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[197]*See* Love, *supra* note 10.

[198]349 N.E.2d at 760 (rejecting a long line of Indiana cases).

[199]*Id.* at 761.

personal injury and personal property damage in tort under traditional negligence principles.[200]

However, Judge Buchanan rejected the doctrine of strict liability in tort, traditionally imposed upon the seller of defective goods under the *Restatement (Second) of Torts*, section 402(A), noting that the comparison of a lessor to a seller of goods is "strained."[201] While conceding that "the wind in Indiana blows in the direction of strict liability," he concluded that this question requires a policy decision suitably reserved for policy makers—the Indiana Supreme Court or the legislature.[202] But having rejected strict liability, the court had to decide whether the trial court erred in giving Instruction 7, which was apparently based on a strict liability in tort theory.[203] The court of appeals determined that the instruction was "harmless error" since a verdict will not be set aside when the jury has been instructed on two or more theories and there is evidence on *any* theory which will sustain the judgment.[204] Here there were two other theories—breach of an implied warranty (contract) and negligence (tort).

Turning first to recovery for the contractual breach of the warranty of habitability, Judge Buchanan noted that consequential damages under *Hadley v. Baxendale* have been extended to encompass personal injuries and personal property damages, and that the UCC likewise permits recovery of such damages resulting from a breach of warranty.[205] However, he was not willing to go all the way with the analogy to the breach of warranty under the UCC: "Permeating discussions of what constitutes a breach of the implied warranty of habitability is the requirement of notice.... As Professor Love explains, this notice requirement reflects a continued unwillingness on the part of courts to subject a landlord to strict liability."[206]

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[200]*Id.* at 765 (emphasis in original). Presumably, then, personal injury and property damages should be recoverable either under tort principles (negligence) or as consequential damages for breach of contract as earlier recognized by the court. *Id.* at 761-62.

[201]*Id.* at 768. *But see* Gilbert v. Stone City Constr. Co., 357 N.E.2d 738 (Ind. Ct. App. 1976).

[202]349 N.E.2d at 768-69.

[203]Instruction 7 was as follows:

> It is the law of this state that *one who leases an apartment containing a heating system that is in a defective condition* unreasonably dangerous to the lessee or his property ... is liable for injuries or damages thereby caused ... if the lessor is in the business of leasing apartments containing such heating systems .... *This law applies even though the lessor exercised all possible care in the leasing of the premises or heating system.*

Id. at 765 (emphasis by *Old Town* court).

[204]*Id.* at 769-71.

[205]*Id.* at 761-62.

[206]*Id.* at 774-75.

Under the UCC the warranty is breached if the goods are not merchantable or fit for the use intended at the time of delivery without any showing of notice on the part of the seller.[207] In other words the seller is strictly liable without proof of fault.

Much of the court's discussion of the warranty of habitability can easily be misinterpreted because the concept of contractual liability is introduced in issue two, dealing with strict liability in tort and the effect of the trial court's Instruction 7, prior to the discussion, in issue three, of what constitutes a breach of the warranty. These premature comments can easily lead one to believe that the implied warranty is based on strict liability without proof of fault, *i.e.*, without notice of the defective condition and a reasonable time to correct it. The following passages illustrate this obscurity:

> Jurisdictions adopting an implied warranty of habitability have bottomed the concept in strict liability . . . a *contractual* strict liability derived from the holding out of the premises by the landlord to be fit for human inhabitation and from the strong analogy to the Uniform Commercial Code . . . .
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> . . . .
>
> But while the landlord's *contractual* liability is conditioned only upon breach of his implied warranty of habitability without *independent proof of fault*, his *tort* liability has not been so determined.[208]

By the first quoted paragraph, the court apparently intended to show that there are still important legal distinctions between strict liability in tort based upon section 402(A) and strict liability for breach of warranty under UCC §§ 2-314 and 2-315.[209] But that there

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[207]J. WHITE & R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE 286-88 (1972).

[208]349 N.E.2d at 767 (emphasis added in last paragraph) (footnote omitted).

[209]While fault is not a factor in either a breach of warranty or § 402(A) suit, there are several important distinctions between the two actions. In most states the statute of limitations in a § 402(A) action is two years, whereas the statute of limitations for breach of warranty is longer. WHITE & SUMMERS, *supra* note 207, at 339-43. In Indiana the statute of limitations for breach of warranty could be six, ten, or fifteen years in non-sale transactions. IND. CODE §§ 34-1-2-1 to -3, 34-4-20-2 (Burns 1973). In sale of goods cases the statute of limitations is four years. *Id.* § 26-1-2-725 (Burns 1974). More importantly, however, in a warranty suit the statute of limitations would begin to run from the time of the transaction, while in a § 402(A) suit the statute of limitations would not begin to run until the time of the injury. WHITE & SUMMERS at 339-43.

The second important distinction is the privity issue. In a § 402(A) action privity of contract is not an issue, and strangers to the transaction may recover for personal injuries caused by the defective condition of the product when the supplier of the product should reasonably have foreseen them as subject to harm. Gilbert v. Stone

may be important distinctions between the warranties under the UCC and the hybrid warranty of habitability in residential leases is not apparent.[210] The second quoted paragraph is more enlightening. The reference to "independent proof of fault" suggests that there may be a nonindependent element of fault connected with the warranty itself, and the statement is followed by a footnote directing the reader to issue three for a discussion of what constitutes a breach of the implied warranty. Thus, while Judge Buchanan has concluded that contractual strict liability will result from a breach of the implied warranty of habitability, at the same time he has indicated that the warranty is not breached until the landlord has notice of the defect and time to repair.

Although Judge Buchanan has introduced the notice or fault concept into the first branch of the warranty, thus distinguishing it from the UCC warranties, he has reduced its impact by stating that the notice requirement is minimal:

> Constructive notice of latent defects is presumed by some jurisdictions from the landlord's prior possession of the premises and from his implied warranty, i.e., his implied "affirmation of fact," that the premises are free from any such defects.
>
> . . . .
>
> Presuming the landlord has notice of existing latent defects at the inception of the lease (regardless of whether

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City Constr. Co., 357 N.E.2d 738 (Ind. Ct. App. 1976). In a breach of warranty action, however, privity of contract is an issue, and Indiana has adopted the most restrictive of the UCC alternative provisions, limiting the seller's warranty to the buyer, his family, household, and guests. IND. CODE § 26-1-2-318 (Burns 1974).

A third distinction involves disclaimers and limitations of remedies. These are permitted by the UCC. IND. CODE §§ 26-1-2-316, -2-719. *But see* Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960) (suggesting that a disclaimer of warranties will not prevent recovery where there has been personal injury). Disclaimers should have no effect in a § 402(A) action.

Perhaps the distinctions are less important now in light of Barnes v. Mac Brown & Co., 342 N.E.2d 619 (Ind. 1976), which ignored the privity of contract question in allowing a remote vendee to recover on the implied warranty of habitability from the builder-vendor and suggested that there should be no distinction made between "economic loss of bargain" and "personal injuries" caused by a defective product, *i.e.*, between a contract and a tort action.

[210]While the court talks about strict liability following a breach of the warranty of habitability, the court later holds that the breach itself does not occur without proof of fault. 349 N.E.2d at 774-75. Thus, as noted by Judge Sullivan in his concurring opinion, the landlord is not in breach of the warranty unless his failure to provide a habitable dwelling is tantamount to negligence. *Id.* at 789-90. This is far different from the UCC warranties under which the seller is strictly liable when the goods are not merchantable or fit for the use intended, *i.e.*, where strict liability refers to the breach itself, not to damages flowing from the breach.

> they must be ascertainable by a reasonable inspection) carries strong overtones of strict liability. A blurry line separates constructive notice and the imputed notice characteristic of the UCC warranties . . . and strict products liability in terms of . . . §402(A).[211]

With the introduction of the fault concept into the warranty of habitability it is difficult to detect any practical difference in the result reached, regardless of whether the suit for personal injury and personal property damage is brought for breach of the warranty of habitability (contract) or for negligence (tort). The court in *Old Town* found that the failure to inspect at the "rough-in stage" of construction was the basis for both the builder's constructive knowledge of the defect (notice) and negligence in failing to perform his duty to repair.[212] This led Judge Sullivan, in his concurring opinion, to conclude that the opinion of Judge Buchanan holds:

> [A] defendant . . . is not in "breach" of his "warranty" unless his failure to live up to his obligation to provide a leasehold substantially free of defects is *tantamount to negligence*, i.e., he "must receive notice of the allegedly defective condition and a reasonable time to correct it before the tenant can assert a breach of the warranty of habitability."[213]

Judge Sullivan, citing both *Theis v. Heuer*,[214] in which the Indiana Supreme Court established an implied warranty of fitness in the sale of a new home by a builder-vendor, and *Barnes v. Mac Brown & Co.*,[215] in which the Indiana Supreme Court extended the builder-vendor's warranty to subsequent purchasers, would apply the doctrine of strict liability to a builder-lessor for injuries resulting from a defective condition in the leased premises.[216] Judge Sullivan contended that both of the above cases are based, in part, on an analogy to the law of products liability, section 402(A),[217] but that even if they are "cast in terms of the builder-vendor's warranty of habitability," as suggested by Judge Buchanan, there is nothing in the decisions suggesting a pre-injury notice requirement.[218]

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[211] *Id.* at 775.

[212] *Id.* at 775, 781.

[213] *Id.* at 789-90 (emphasis added).

[214] 280 N.E.2d 300 (Ind. 1972).

[215] 342 N.E.2d 619 (Ind. 1976).

[216] 349 N.E.2d at 789.

[217] *Id.* at 790.

[218] As noted by Judge Sullivan, *Barnes v. Mac Brown & Co.* suggests there should be no distinction between the sale of real property and the sale of personal property. 342 N.E.2d at 621. Likewise, *Theis* cited as authority Schipper v. Levitt & Sons, Inc., 44 N.J. 70, 270 A.2d 314 (1965), which held a builder of a house liable for personal

It is interesting to note that while both parties assumed Instruction 7 was a section 402(A) instruction, as a footnote in the case suggests, "[i]t could be theorized that the Instruction is justifiable as a type of strict liability *in contract* arising from breach of implied warranty of habitability as consequential damages."[219] As such, the giving of the instruction could be viewed as harmless error. But this argument would be more convincing if the warranty were not a hybrid requiring pre-injury notice. Instruction 7 contains no language suggesting such a limitation, but on the other hand, neither does Instruction 6, dealing with the warranty of habitability.[220]

Perhaps the problem is that the case was not presented as a suit against a builder for breach of his warranty of fitness for use. No doubt the plaintiff's attorneys could not foresee that the court would pierce the corporate veil of the builder-corporation thereby making the builder and the lessor partnership one and the same.[221] Nor could they foresee that the Indiana Supreme Court would subsequently extend the builder's warranty to subsequent purchasers, and by analogy to subsequent lessees. Thus, this theory was not considered at the trial level and the court of appeals may have been unwilling to decide the case on a new theory. Had the court been presented with this theory, it might been more willing to apply strict liability to the builder-lessor. Instead, Judge Buchanan considered the liability of an ordinary landlord under his implied warranty of habitability rather than the liability of a builder under his warranty of fitness for use. Thus, the language suggesting the analogy of a landlord to a seller (builder) is strained. Likewise, Judge Sullivan indicated that it was not necessary to decide whether to apply the doctrine of strict liability

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injuries of the vendee without regard to fault. Subsequent to *Old Town* the Indiana Court of Appeals has held the lessor of personal property strictly liable for injury to a bystander caused by defective leased equipment. Gilbert v. Stone City Constr. Co., 357 N.E.2d 738 (Ind. Ct. App. 1976). If § 402(A) applies to one in the business of leasing goods, then the same rule should logically apply to the landlord in the business of leasing real estate.

[219]349 N.E.2d at 766 n.25 (emphasis by court).

[220]Instruction 6 stated:

> If you find that plaintiff and his family leased such apartment, relying on defendant Old Town Development Company to furnish to them an apartment suitable for such purpose, and that the defendant . . . knew that the apartment was to be used for such purpose [as a single family dwelling], then you may find an implied warranty . . . .
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> . . . .
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> If you find that the apartment was not reasonably fit and proper for the purpose to which it was to be used, then you may find a breach of an implied warranty by defendant . . . .

Id. at 752-53.

[221]*Id.* at 776-80.

to the ordinary landlord, and that he was doing so in this case only because the defendant was a builder-lessor.[222] It appears we must await further development or clarification of the nature of the landlord's warranty of habitability. In view of *Theis* and *Barnes* the court could, when the issue is more clearly presented, extend the law of products liability to a builder-vendor, or as suggested by some commentators, to a landlord "in the business of leasing";[223] or it could simply decide, on the grounds of public policy, to treat the warranty of habitability the same as the warranties under the Uniform Commercial Code.

5. Waiver

The creation of an implied warranty of habitability in residential leases, with the resultant contractual and tort remedies, impliedly raises a critical question: To what extent may this warranty be negated by waiver or exculpatory clauses? Since standard lease forms are drafted by landlords' attorneys, and based upon past practices, it can be assumed that anything which can be waived will be waived in the lease.[224] If the implied warranty of habitability can readily be waived through lease provisions, then discussion of the implied warranty itself becomes moot and illusory.

Because the recognition of an implied warranty of habitability is relatively new, few courts have dealt directly with the concept of waiver.[225] The use of exculpatory clauses in leases, however, has been a common method through which landlords have attempted to insulate themselves from tort liability for their own negligence, and one is tempted to draw an analogy to these clauses. If this analogy holds, then there is indication that waiver will be severely restricted, but not prohibited, in Indiana.

Although waiver of the implied warranty of habitability was not raised in *Old Town*, the lease did contain exculpatory[226] and hold

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[222]*Id.* at 793.

[223]Love, *supra* note 10, at 160.

[224]A common assumption is that "[s]ince the landlord usually occupies an impregnable bargaining position, it may be assumed that any responsibility placed on the landlord which can be waived, will be waived." MODEL CODE, *supra* note 4, § 2-203, Comment.

[225]*See* notes 94 & 95 *supra* and accompanying text for a discussion of these cases.

[226]The exculpatory clause read as follows:

> 19. LESSORS' NON-LIABILITY. It is agreed that *the Lessor shall not be liable to the Lessee or any other person* on the demised premises or in the building or adjoining grounds and parking lot, by the Lessee's consent, invitation or license, expressed or implied, *for any damages either to person or property*, sustained by reason of the condition of said premises or building or any part thereof, or arising from the bursting or leaking of any water, gas,

harmless[227] clauses intended to insulate the landlord from tort liability. As to the lease provisions "involved in this case,"[228] the trial court instructed that they were "unreasonable and unenforceable under the law of this state."[229] Despite the lessor's argument that "[i]n the absence of evidence that the contract was in fact unconscionable due to a great disparity of bargaining power or lack of mutuality . . . an exculpatory clause is valid in Indiana," the court of appeals found no error in the instruction "under these circumstances."[230]

The "circumstances" under which the court of appeals determined the exculpatory and save harmless clauses to be invalid as a matter of law were that the lessees signed a printed form contract without reading it or having the waiver provisions called to their attention.[231] It is therefore safe to conclude that the implied warranty can never be waived merely by having the tenant sign a form lease containing a waiver provision.

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sewer, or steam pipes, or *due to the act of neglect of any employee of the Lessor*, or the act of any co-tenant or any occupant of said building or other person therein, or due to any casualty or accident in or about said building.

349 N.E.2d at 782-83 (quoting Lease Article 19) (emphasis by court).

[227]The hold harmless clause provided:

> 20. LESSEE'S LIABILITY. The *Lessee agrees to be responsible for any damage to the property of the Lessor* which may result from any use of the demised premises, or any act done thereon by the Lessee or any person coming or being thereon by the license of the Lessee, expressed or implied, *and will* also *save the Lessor harmless from any liability. The Lessee agrees to save the Lessor harmless from all costs, damages* or losses *resulting from their conduct or acts relating to or in and about the demised premises.*

Id. at 783 (quoting Lease Article 20) (emphasis by the court).

[228]*Id.* When the court of appeals quoted these provisions, which were contained in the trial court's instruction as set out in note 226 *infra*, it italicized them as though to emphasize that the *Old Town* decision concerning the unenforceability of these types of provisions was limited to the lease and facts of this case.

[229]*Id.* The entire instruction read:

> Any provisions *in the lease involved in this case* which attempt to exculpate, excuse or release defendant Old Town Development Company from its own wrongful acts or omissions, or which provide that the Lessee shall indemnify or hold harmless defendant Old Town Development Company from injuries or damages resulting therefrom, are unreasonable and unenforceable under the law of this state. The lease is to be construed most strictly against defendant Old Town Development Company, and any ambiguities in such lease are to be construed against defendant Old Town Development Company.

Id. at 783 (quoting Plaintiff's Instruction No. 10) (emphasis by court).

[230]*Id.* at 783-87.

[231]The lease in *Old Town* was a copyrighted form lease drafted by the owners-lessors who were also attorneys. The evidence was without conflict that the lessees neither read the lease nor had these exculpatory provisions brought to their attention. *Id.* at 782.

Apparently, however, waiver is still possible. The court of appeals recognized a general rule of enforceability of exculpatory clauses but came to the "inescapable [conclusion] that the general rule is more honored in the breach than in the observance."[232] Nevertheless, presumably waiver clauses may be placed in leases and enforced if *"knowingly and willingly"*[233] recognized and accepted by all parties.

What constitutes knowing and willing acceptance of a waiver provision must certainly depend, in large part, upon the facts of each case. The circumstances, such as the bargaining position of the parties[234] and the general atmosphere of the transaction,[235] should present a situation conducive to intelligent and meaningful choice. In other words, liability may not be shifted contractually through what the court terms intimidation or trickery.[236]

Most commentators have concluded that the extent to which each jurisdiction will permit a waiver of the warranty depends upon the rationale used to establish the warranty.[237] If the warranty is viewed simply as an implied term of the rental agreement then logically it can be waived by another contractual provision. The lessee should not escape the effect of such a provision if it is brought to his

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[232]*Id.* at 784 (recognizing exceptions to the general rule of waiver based on public policy and necessitated by housing shortages, large complexes, public housing laws, unequal bargaining position of the parties, active negligence of the landlord, the tenant's lack of skill to comprehend lease terms' meaning and unconscionability).

[233]*Id.* at 785, *quoting* Weaver v. American Oil Co., 257 Ind. 458, 276 N.E.2d 144 (1971) (emphasis by *Old Town* court). Both *Old Town* and *Weaver* place the burden on the party submitting these terms to demonstrate the willing character of the other party's acceptance.

[234]Although housing shortages are not as pervasive in Indiana as in the more densely populated states, *see* discussion at note 18 *supra*, a disparity of bargaining power obviously still occurs in Indiana and is illustrated by the widespread use of form leases, containing waiver and exculpatory clauses, along with rental office attendants who are powerless to alter the provisions.

[235]Likewise, even a knowledgeable individual secures no better position than the uninformed lessee since lease provisions are rarely negotiable.

[236]349 N.E.2d at 785.

[237]Professor Love, for example, concludes:

> When the warranty is based upon the provisions of a housing code, the courts have not permitted the tenant to waive or disclaim it. This is consistent with general principles of both tort, and contract law.
>
> On the other hand, when the warranty is premised on judicial notions of public policy, the courts have normally held that the warranty may be waived or disclaimed.

Love, *supra* note 10 at 106 (footnotes omitted). Most suggested statutes, however, range from restrictive to prohibitive on the permissibility of waiver provisions. *See* MODEL CODE, *supra* note 4, at 2-203 & Comment; notes 98-100 *supra* and accompanying text (RESTATEMENT); notes 96-97 *supra* and accompanying text (URLTA).

attention, it is reasonably understandable, and the circumstances surrounding the lease agreement are not oppressive or intimidating.[238] Likewise, waiver by the actions of the parties should theoretically be possible if the defect is patent at the lease's inception, since acceptance of the premises in the known defective condition excludes the possibility of an implied understanding that the premises will be habitable, at least with respect to the known defects.[239] The same rationale should apply if defects arise during the term of the lease and the tenant remains silent.

On the other hand, if the jurisdiction has determined that it is against public policy to lease premises with housing and health code violations materially affecting health and safety, then this would seem to negate the possibility of a waiver of such code violations.[240] In the final analysis, though, we see little distinction among the bases of public policy—whether housing code or other judicial reasoning—as they relate to waiver. No court creates a warranty purely as a matter of implied contracts; instead, societal conditions have become such as to compel the warranty. Thus, any rationale for unbridled waiver is militated against.

B. Retaliatory Eviction

At the end of the term, the landlord has the option of terminating the estate or reletting the premises for another term on such terms and conditions as he sees fit. Likewise, the tenant has the right to report housing and health code violations materially affecting health and safety to the proper governmental authorities. It is obvious that these two fundamental rights may conflict. If the landlord can evict a tenant or increase his rent at the end of the term in retaliation for his reporting housing and health code violations, this will have a "chilling effect" on code enforcement.[241] It should be noted that the poor seldom have long term leases and are often tenants from month

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[238] The lesson of *Weaver* is not that lessees are excused from reading leases or that they are necessarily relieved from liability resulting from exculpatory and save harmless clauses, but rather that they may not be intimidated or tricked into assuming unlimited liability under circumstances making it unconscionable for them to be bound by booby trap clauses hidden away in a printed form lease prepared by the lessor. Under such circumstances, to allow a lessor to require a lessee to assume the lessor's negligence and to indemnify the lessor for the lessor's own negligence, is to allow a wary landlord to ambush an unwary lessee.

349 N.E.2d at 785 (footnote omitted).

[239] See notes 90-95 *supra* and accompanying text.

[240] *See, e.g.*, Foisy v. Wyman, 83 Wash. 2d 22, 515 P.2d 160 (1973).

[241] *See* Dickhut v. Norton, 45 Wis. 2d 389, 397-99, 173 N.W.2d 297, 301-02 (1970).

to month or week to week, so that the ones who are most in need of protection from retaliatory conduct are the ones with the least protection.[242]

While the right of the landlord to evict the tenant at the end of the term for any legitimate reason, or for no reason at all, is still recognized, a growing number of jurisdictions now recognize that it is against public policy to permit the landlord to evict the tenant or to increase his rent in retaliation for the tenant's reporting housing code violations to the proper authorities.[243]

One difficult issue raised by the defense of retaliatory conduct is the issue of burden of proof.[244] Since the landlord's conduct would be proper if done for any reason other than retaliation for the tenant's excercise of his legal rights, how can the tenant show that the landlord's motive was unlawful? One simple solution would be to create a rebuttable presumption that such action by the landlord is retaliatory if done within a certain period of time following the tenant's request for the landlord to remedy code violations or following the tenant's reporting of such violations to a governmental agency.[245] This would then shift the burden of going forward with the evidence to the landlord to demonstrate that his conduct was not retaliatory, *i.e.* that he was taking the action for some legitimate reason. The argument against this position, however, is that a clever tenant could report housing code violations merely to create a form of "tenure" under which the landlord could evict the tenant only for cause.

Although there are no Indiana cases directly on point, a recent Indiana Supreme Court decision, *Frampton v. Central Indiana Gas Co.*,[246] leaves little doubt that Indiana will recognize the retaliatory defense under the proper circumstances. The case involved the firing of an employee for filing a claim under the Indiana Workmen's Compensation Act. In reversing the lower court's dismissal of the suit for failure to state a cause of action, the court held that while the employer could fire the employee for any legal reason, or for no

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[242]*See* Schoshinski, *supra* note 7, at 541-42.

[243]For a collection of cases on this point, see Annot., 40 A.L.R. 3d 753 (1971).

[244]*See* Note, *Landlord and Tenant, Burden of Proof Required to Establish Defense of Retaliatory Eviction*, 1971 WIS. L. REV. 939.

[245]The URLTA would create a presumption of retaliatory eviction for a period of one year following a reporting of housing code violation. URLTA, *supra* note 4, § 5.101. Several courts have also established a rebuttable presumption of retaliatory eviction following the tenant's reporting of housing code violations. *E.g.*, Robinson v. Diamond Housing Corp., 463 F.2d 853, 865 (D.C. Cir. 1972); Edwards v. Habib, 397 F.2d 687, 702 n.53 (D.C. Cir. 1968).

[246]260 Ind. 249, 297 N.E.2d 425 (1973).

reason at all, the employer could not fire the employee for filing the claim because such conduct would have a chilling effect on the exercise of a statutory right.[247] While the case did not involve a retaliatory eviction the analogy is clear, and in dictum the court itself drew this analogy: "Housing codes are promulgated to improve the quality of housing. The fear of retaliation for reporting violations inhibits reporting and, like the fear of retaliation for filing a claim, ultimately undermines a critically important public policy."[248] The court did not address the burden of proof issue other than to note that the issue of retaliation is a question for the trier of fact.

C. Abandonment, Mitigation of Damages, and Anticipatory Repudiation

One of the most troublesome problems arising under traditional landlord-tenant law was what action, if any, the landlord should take when the tenant has abandoned the premises and repudiated his obligations under the lease before the end of the term.[249] Since the lease was viewed as a conveyance of land, the landlord was under no obligation to mitigate damages caused by the tenant's default.[250] In fact, the landlord was afraid to take any action to mitigate his damages. If the landlord reentered and relet the premises, a court might find such action inconsistent with the tenant's rights under the lease and that it thus effected a surrender by operation of law.[251] If the landlord accepted the offer to surrender, the estate came to an end and with it the obligation to pay rent.[252] Likewise, since acceptance of surrender ends all future obligations under the lease, no damages result from the surrender.[253]

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[247]*Id.* at 253, 297 N.E.2d at 428.

[248]*Id.*

[249]McCormick, *The Rights of the Landlord Upon Abandonment of the Premises by the Tenant*, 23 MICH. L. REV. 211, 211-12 (1925).

[250]11 WILLISTON, *supra* note 2, § 1403. The modern trend, however, is to recognize a duty on the part of the landlord to mitigate damages following an abandonment or breach of the lease by the tenant. C. DONAHUE, T. KAUPER & P. MARTIN, CASES AND MATERIALS ON PROPERTY: AN INTRODUCTION TO THE CONCEPT AND THE INSTITUTION 795 (1974). For a collection of cases on this point, see Annot., 21 A.L.R.3d 534 (1968).

[251]2 POWELL, *supra* note 12, ¶ 247[5].

[252]*See, e.g.*, Paxton Realty Corp. v. Peaker, 212 Ind. 480, 9 N.E.2d 96 (1937); Carp & Co. v. Meyer, 89 Ind. App. 490, 167 N.E. 151 (1929); Donahoe v. Rich, 2 Ind. App. 540, 28 N.E. 1001 (1891). *See also* A.L.P., *supra* note 2, § 3.99. Attempts to preserve the tenant's liability by rent acceleration clauses or provisions for forfeiture of the security deposits generally have been unsuccessful. *Id.* § 3.97.

[253]3A THOMPSON, *supra* note 27, § 1348. Most courts have allowed damages following a termination of the estate when the lease contains a "forfeiture" or "saving" clause permitting the lessor to relet the premises and hold the lessee liable for the difference between the reserved rent and the rent received from reletting or in

Of course, the landlord could sit back, do nothing, and collect the rent as it became due, but this would require him to rely upon the continued solvency of the tenant.[254] Instead, the landlord would prefer to relet the premises to a new tenant, thereby reducing his losses in the event of the original tenant's insolvency or disappearance.[255] To prevent the reletting from being viewed as an acceptance of surrender by operation of law, landlords often insert a clause in the standard lease permitting them to relet the premises to mitigate damages in the event of a forfeiture or abandonment by the tenant.[256] Such provisions have been enforced by the courts; the only problem is that the courts have often held that such a provision creates a duty on the part of the landlord to use reasonable efforts to relet the premises in the event of an abandonment or forfeiture of the estate, and that unless the landlord does so, the tenant's liabilities under the lease terminate.[257]

Such a provision, however, does not solve a more serious problem. Most long term leases provide for the payment of rent in installments, usually in advance, on the first day of each month. Since the abandonment is generally accompanied by words or actions indicating that the tenant is repudiating his obligations, and is usually followed by a partial breach—the failure to pay rent installments as they become due—the landlord would like to treat the abandonment and partial breach as an anticipatory repudiation of the entire lease. This would permit the landlord to sue at once for his damages. Unfortunately, a number of courts have refused to designate an abandonment, even when accompanied by a partial breach of the lease, as a repudiation of the entire lease.[258] The refusal of courts to apply this contract remedy to breach of a lease is based upon the historic concept that the lease is a conveyance and not a contract.[259] As long as the landlord did not treat the abandonment or partial

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damages. *Id.;* A.L.P., *supra* note 2, § 3.97. However, a recent Indiana decision, Northern Ind. Steel Supply Co. v. Chrisman, 139 Ind. App. 27, 204 N.E.2d 668 (1965), seems to draw a distinction between a landlord's attempt to mitigate damages under such a provision and an actual acceptance of surrender. In *Chrisman* the landlord had sold fixtures and equipment reducing the building to a "shell," rather than attempting to relet the premises "furnished." In the latter situation the lease terminates, including the saving clause and the tenant is relieved of all further liability.

[254]2 POWELL, *supra* note 12, ¶ 231[1].

[255]*Id.*

[256]*Id.;* 3A THOMPSON, *supra* note 27, § 1343.

[257]*See, e.g.,* Carpenter v. Wisniewski, 139 Ind. App. 325, 215 N.E.2d 882 (1966); Waffle v. Ireland, 86 Ind. App. 119, 155 N.E. 513 (1927).

[258]A. CORBIN, A COMPREHENSIVE TREATISE ON THE RULES OF CONTRACT LAW § 986 (1951). The cases on this point are collected in Annot., 137 A.L.R. 432 (1942).

[259]McCormick, *supra* note 249, at 216-18.

breach as a forfeiture of the estate, or accept the offer to surrender, the obligation to pay rent continued.[260] However, if the landlord did treat the abandonment or partial breach as a forfeiture or by his actions accepted the offer to surrender, the estate terminated and with it the obligation to pay rent.[261] The landlord was without a remedy since no damages could be recovered following a forfeiture or acceptance of surrender.[262] Despite this general rule of law, the courts have uniformly upheld the "saving clause" in a lease which permits the landlord, in the event of a forfeiture or abandonment, to reenter and relet the premises and hold the tenant liable for the difference between the reserved rent and the rent received from reletting.[263] While most writers recognize that such a clause is in reality an indemnity or liquidated damages provision,[264] some courts treat it as if the estate continues and the action is one for rent.[265] As a result, the landlord is forced to file separate suits as each rent installment comes due, or because of the expense of multiple litigation, wait until a sufficient amount of rent has become due to justify the cost involved in recovering the rent.

Now that the courts have recognized that the lease is a contract as well as a conveyance of land, there is no justification for refusing to apply contract principles to breach of a lease.[266] Such a position benefits both the landlord and the tenant. The landlord is able to sue at once for his damages.[267] The only difficulty is in determining the amount of damages. While the tenant will no longer be liable for the rent, the loss of rent should be considered in computing damages, less the amount received from the landlord's reasonable efforts to

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[260] 3A THOMPSON, *supra* note 27, §§ 1299, 1343 & 1344.

[261] *Id.*; 1 A.L.P., *supra* note 2, §§ 3.94 & 3.99.

[262] *Id.* § 3.97; McCormick, *supra* note 249, at 217-19.

[263] 1 A.L.P., *supra* note 2, § 3.97; 2 POWELL, *supra* note 12 ¶ 231[1]; 3A THOMPSON, *supra* note 27, § 1343.

[264] *See generally* authorities cited note 263 *supra*.

[265] *See* Booher v. Richmond Square, Inc., 310 N.E.2d 89 (Ind. Ct. App. 1974); Northern Ind. Steel Supply Co. v. Chrisman, 139 Ind. App. 27, 204 N.E.2d 668 (1965).

[266] There could, however, be a problem in applying the law of contracts to the lease because of the historic "rent for possession" concept. Several decisions have treated the lease as a unilateral contract or a bilateral contract fully performed by the landlord—the landlord having given the tenant possession of the land has no further obligations to perform and the tenant's obligation is the payment of rent at fixed times in the future. 4 CORBIN, *supra* note 258, § 986. When the only obligation is the payment of money at specified times the general rule is that there can be no anticipatory repudiation and a suit can only be maintained for each installment as it becomes due. DONAHUE, KAUPER & MARTIN, *supra* note 250, at 800. But the obligations in the lease are not unilateral particularly in view of the implied warranty of habitability. For an excellent discussion of the lease as a bilateral contract, see Hawkinson v. Johnston, 122 F.2d 724 (8th Cir.), *cert. denied*, 314 U.S. 694 (1941).

[267] *Id.*

mitigate his damages by reletting the premises. Until the landlord is able to relet he should be allowed to recover the reserved rent;[268] and when he is able to relet the premises, the income received from the reletting should be considered by the court to be the fair rental value. A reasonable good faith effort to relet the premises should satisfy the contractual duty to mitigate damages. To require the landlord to prove his damages—the difference between the reserved rent and the fair rental value—by expert testimony would be too expensive and too speculative.[269]

While the landlord will now be required to mitigate his damages following an abandonment by the tenant, in reality this duty may in fact benefit the landlord. This result occurs because it appears highly unlikely that a court would find that the landlord's reentry and reletting constitute an acceptance of surrender since he is now under a duty to relet.[270]

The application of contract principles will be of equal benefit to the tenant. The landlord will now be required to mitigate his damages by making a reasonable effort to relet the premises. Also, it may result in the courts' interpreting of convenants prohibiting assignment without the landlord's written consent to require the withholding of consent to be reasonable rather than absolute in light of the landlord's duty to mitigate his damages.[271]

At the present time, it appears that Indiana will not apply the doctrine of anticipatory repudiation to the tenant's abandonment of the premises, despite the existence of unpaid rent installments. In *Booher v. Richmond Square, Inc.*,[272] the Indiana Court of Appeals affirmed the lower court's refusal to dismiss a landlord's suit to recover rents which had become due and owing subsequent to a judgment in a prior action for rent under the same lease. In rejecting the tenant's defense of res judicata, the court held that the landlord could not have recovered rent which was not due and owing at the time of the prior action.[273] If Indiana recognized the doctrine of anticipatory repudiation, the suit should have been dismissed since the landlord could have recovered all of his damages in the prior

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[268]This is the position taken by the URLTA. The estate continues after abandonment until the landlord by the use of reasonable efforts is able to relet the premises, at which time the estate terminates. URLTA, *supra* note 4, § 4.203. Upon reletting, the landlord can recover actual damages and attorney's fees. *Id.* § 4.206.

[269]*See* note 146 *supra* and accompanying text.

[270]*See* State v. Boyle, 344 N.E.2d 302 (Ind. Ct. App. 1976); Hirsch v. Merchants Nat'l Bank & Trust Co., 336 N.E.2d 833 (Ind. Ct. App. 1975).

[271]2 POWELL, *supra* note 12, ¶ 246(1)(a); RABIN, *supra* note 13, at 167.

[272]310 N.E.2d 89 (Ind. Ct. App. 1974).

[273]*Id.* at 90-92.

action based upon the tenant's abandonment and his refusal to pay subsequent rent installments.[274]

Two recent Indiana Court of Appeals decisions offer some hope that the *Booher* decision will not be followed in the future. In *Hirsch v. Merchants National Bank & Trust Co.*,[275] the court of appeals held that a landlord is required to use such diligence as would be exercised by a reasonably prudent man to relet the premises after abandonment by the tenant. A similar conclusion was reached in *State v. Boyle*.[276] In both cases the tenants claimed that the landlord's actions in reentering and attempting to relet the premises effected a surrender by operation of law. In rejecting this defense the court noted that the landlord is now under a duty to mitigate damages and it would be inconsistent to hold that an attempt to relet the premises constitutes an acceptance of surrender.[277] The language in both cases suggests that the court considered the lease a contract and applied contractual principles. Now that the landlord is under a duty to mitigate damages, there is no reason to refuse to apply the doctrine of anticipatory repudiation.

D. Legislation

At the present time Indiana does not have a comprehensive landlord-tenant code, and the few statutes in this area date from the nineteenth century.[278] Within the past five years there have been three attempts in the Indiana legislature to enact a modern landlord-tenant code. The bills introduced have all been variations of the URLTA.[279]

In 1973 the URLTA was introduced in the Indiana legislature but the Act never got out of the Judiciary Committees of the House and Senate.[280] The URLTA was again introduced in the legislature in 1975. This time H.B. 1042 passed in the House by a vote of 53 to 25,[281] but died in the Senate Public Policy Committee without a hearing.[282]

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[274]Polston, *Property, Survey of Recent Developments in Indiana Law*, 8 IND. L. REV. 228, 229-30 (1974).

[275]336 N.E.2d 833 (Ind. Ct. App. 1975).

[276]344 N.E.2d 302 (Ind. Ct. App. 1976).

[277]*Id.* at 304-05; Hirsch v. Merchants Nat'l Bank & Trust Co., 336 N.E.2d at 836-37.

[278]IND. CODE §§ 32-7-1-1 to -4-1 (Burns 1973).

[279]The URLTA, in various forms, has been enacted in 13 states and is being actively considered for adoption in several others. *Beyond URLTA*, *supra* note 4, at 3-4. For a list of the states and cites to statutes with commentary, see *id.* at 3 n.6.

[280]*Indiana House Journal*, 1973 Regular Session 1833; *Indiana Senate Journal*, 1973 Regular Session 1409.

[281]*Indiana House Journal*, 1975 Regular Session 207.

[282]*Indiana Senate Journal*, 1975 Regular Session 183, 437.

In 1976, a watered down version of the URLTA was introduced in the legislature. The compromise bill, H.B. 1153, was the result of efforts by Representative John Day, the sponsor of the bill, Professor R. Bruce Townsend, a member of the subcommittee of the Commissioners on Uniform State Laws which actually drafted the URLTA, Jerry Gorup, the Executive Director of the Apartment Association of Indianapolis, and other interested persons.[283] At the last minute the Apartment Association of Indianapolis withdrew its support from the bill and actively opposed its adoption.[284] In the House, the bill received 47 ayes and 45 nays but fell four votes short of the constitutional majority necessary for passage.[285]

In January 1977, H.B. 132, another modified version of the URLTA, was introduced in the legislature.[286] It will be interesting to see whether the legislature will accept even a modified version of the URLTA. Some tenant organizations were opposed to sponsoring the "vastly stripped down shadow" of the URLTA introduced in the 1976 legislature but reluctantly agreed to do so in order to establish the concept of an implied warranty of habitability in residential leases.[287] Now that the court has established the concept in *Old Town*, tenant organizations may be less willing to sponsor the compromise bill. Likewise, it does not appear that the landlords have changed their myopic attitude toward legislative reform.[288] In the long run the landlords' opposition to enactment of the URLTA may prove very unwise. In several jurisdictions the law has already developed beyond the URLTA, and its enactment in those states is being actively opposed by tenants' groups as "regressive."[289] Several commentators have suggested that if the URLTA were enacted in a majority of the states, it might set a standard beyond which any suggested reform would be viewed as unreasonable, if not radical.[290] On the other hand, continued legislative inaction can only lead to judicial activism.

It is submitted that the failure of the legislature to enact a comprehensive landlord-tenant code is detrimental to both land-

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[283] *Uniform Landlord-Tenant Acts Fails a Third Time in Indiana Legislature*, The Advocate, Feb. 1976, at 7.

[284] *Id.* at 7-8.

[285] *Indiana House Journal*, 1976 Regular Session H290-91.

[286] Wells, *Backers Hope Changes Key To Passing Landlord Reform*, Indianapolis Star, Jan. 24, 1977, at 1, col. 4.

[287] The Advocate, *supra* note 283.

[288] Wells, *Landlord-Tenant Rights Bill Criticized in Housing Hearing*, Indianapolis Star, Jan. 27, 1977, at 7, col. 1.

[289] Blumberg, *Analysis of Recently Enacted Arizona and Washington State Landlord Tenant Bill*, 7 CLEARINGHOUSE REV. 134 (1973).

[290] *See* Furner, *From the Legislatures: Uniform Residential Landlord-Tenant Act*, 2 REAL ESTATE L.J. 481, 481 (1973); *cf.* Gibbons, *supra* note 4, at 414-15.

lords and tenants. Without a code, the courts will be compelled to modernize the law of landlord-tenant by case law. This slow and piecemeal process will breed uncertainty and litigation, thereby benefiting no one.

IV. Conclusion

Events arising since the main body of this article was written have led the authors to conclude that Indiana is truly at the crossroads of landlord-tenant reform—and is wavering.

Following the Second District Court of Appeals' efforts in *Old Town* to apply modern and realistic standards in an area of law which has long needed revitalization, the Indiana General Assembly once again failed to revise Indiana landlord-tenant law. Not only does any reform based on URLTA appear dead for this session of the legislature,[291] but one author has sensed a resentment among some legislators that the courts would even venture into the area after the legislature considered the problem and chose not to act. If change is to come in the near future, then the responsibility for effectuating it has been delegated to the courts.

However, judicial emergence into modern landlord-tenant law still is not characterized by absolute consistency in Indiana. What the authors saw as hopeful signs for broad application of contract principles to leases—especially in relation to the doctrine of anticipatory repudiation[292]—appears partially stymied. The First District Court of Appeals, in *Roberts v. Watson*,[293] rejected the application of anticipatory repudiation to a lease situation, relying on nineteenth century precedent without considering how its decision accords with modern law and the duties imposed on landlords, such as the duty to mitigate damages.[294]

The Indiana judiciary nevertheless has the responsibility for guiding this jurisdiction through a still developing field of law. Now that the Indiana Supreme Court has *Old Town* before it, on petition to transfer,[295] the courts have the opportunity to devise a statement of minimum expectations because of the legislature's at least temporary abrogation.

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[291]Ind. S. 185 was defeated on third reading on March 14, 1977, by a vote of 26-25.

[292]*See* notes 275-77 *supra* and accompanying text.

[293]359 N.E.2d 615 (Ind. Ct. App. 1977).

[294]*Id.* at 621. *Roberts* relied on Indianapolis D & W Ry. v. First Nat'l Bank, 134 Ind. 127, 33 N.E. 679 (1893) and Elmer v. Sand Creek Twp., 38 Ind. 56 (1871). It is ironic to note that *Roberts* relied on Booher v. Richmond Square, Inc., 310 N.E.2d 89 (Ind. Ct. App. 1974) for the proposition that "the landlord may bring actions for rent as it becomes due," 359 N.E.2d at 621—the very case we had hoped would not be followed.

[295]As this article goes to the printer, it appears that the Indiana Supreme Court is studying *Old Town*. Oral arguments were held by the court on April 12, 1977.

Religion in the Burger Court: The Heritage of Mr. Justice Black

DONALD MEIKLEJOHN*

I. INTRODUCTION

The many years of Mr. Justice Black's service on the Supreme Court were marked by a dramatic focus of attention on the first amendment.[1] The Justice was committed to clarifying and preserving all of the first amendment intentions of Madison and the other Founders—the protection of *political* speech, that is, all those forms of expression which go to form and direct the processes of public decision, and the protection of *religious* speech.[2] Though he did not consistently command a majority in the Court at any time, but was indeed sometimes a solitary dissenter in the cause of full protection for the discussion of public affairs, still his influence always was evident and was, on the whole, progressively greater in his later years.

It is clear that Mr. Justice Black took at face value the Founders' prescriptions regarding "establishment of religion" and religion's "free exercise." He would not, it seems, have subscribed to the proposition advanced by Chief Justice Burger that the establishment and free exercise clauses are inherently at odds when taken to their logical extremes.[3] For Mr. Justice Black, the religion clauses affirmed the same proposition from independent but related points of view: government was not to be in any way the vehicle for promoting or preferring any religious creed or practice, and government was not to inhibit the development of any religious creed or practice. Americans were to enjoy religious freedom, the freedom to formulate and practice their religious beliefs as their own thoughts and sentiments prescribed. As he put the matter: the free exercise clause forbids direct coercion, and the establishment clause indirect coer-

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[1]"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. 1.

[2]*Justice Black and First Amendment "Absolutes": A Public Interview*, 37 N.Y.U.L. REV. 549, 559 (1962) (interview by Professor Edmond Cahn in New York City, Apr. 14, 1962).

[3]Walz v. Tax Comm'n, 397 U.S. 664, 668-69 (1970) (Burger, C.J.).

cion, of religious activity; the latter "rest[s] on the belief that a union of government and religion tends to destroy government and to degrade religion."[4] The religion clauses thus, in fact, protect both political freedom and religious freedom.

The first amendment indeed affirms an essential relationship between religious and political freedoms. Of the latter, Mr. Justice Black came to assert an *absolutist* and *public* interpretation: there may be no qualification on the freedom to discuss public affairs.[5] Of the former we need to ask, then, whether the freedom affirmed is a *private*, rather than a *public* matter: whether religious freedom is to be protected because it is private or whether its protection is ultimately, like that of political discussion, based on its public character. Mr. Justice Black did not, so far as the record shows, answer this question explicitly. But his opinions on the first amendment's religion clauses intimate his basic attitude, as well as his view of the relation between private and public objectives in the Constitution. He associated religious freedom with the freedoms of speech, press, and assembly as essential to assuring the privilege of selecting public policies and public officials.[6] To him the first amendment freedoms, including religion, "are the paramount protections against despotic government afforded Americans by their Bill of Rights."[7] It seems clear that the Justice found the objectives of the religion clauses, at least in part, very close to those of the other provisions of the first amendment. The " 'wall of separation between church and state' "[8] was not to exclude from the state that kind of liberalizing dynamic inherent in the rest of the first amendment. The wall was at least transparent, susceptible of two-way vision.

There is little doubt that the common theme of the various provisions of the first amendment is, in part, a negative theme: that in each of them the Congress is forbidden to interfere with the activity of individuals or non-governmental groups. Certainly Mr. Justice Black reiterated persistently his concern about oppressive government. But the first amendment has its positive thrust as well.[9]

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[4]Engel v. Vitale, 370 U.S. 421, 431 (1962) (Black, J.).

[5]*Cf.* New York Times Co. v. Sullivan, 376 U.S. 254, 296-97 (1964) (Black, J., concurring) ("An unconditional right to say what one pleases about public affairs is what I consider to be the minimum guarantee of the First Amendment.").

[6]H. BLACK, A CONSTITUTIONAL FAITH 44 (1968) (James S. Carpentier lectures, Columbia University of Law) [hereinafter cited as A CONSTITUTIONAL FAITH].

[7]*Id.*

[8]Everson v. Board of Educ., 330 U.S. 1, 16 (1947) (Black, J.), *quoting* Reynolds v. United States, 98 U.S. 145, 164 (1879).

[9]A CONSTITUTIONAL FAITH, *supra* note 6, at 43-63.

It protects the processes through which a self-governing people makes its decisions, including decisions as to what is public, as well as by whom something is to be done in the public realm. Equally, the first amendment expresses our common agreement about what must be "let alone" as the processes of public decision go forward.[10]

The first amendment is not, then, in the thinking of Mr. Justice Black, simply a charter of private immunities. It is true that, as the metaphor of the "wall of separation" suggests, institutional interaction between church and state is forbidden; the precise meaning of this prohibition will be considered below. But that prohibition is to serve the concern, which religious and secular institutions share, in the public's self-government. Religious Americans are American, as well as religious; their interpretations of religion are committed to the kind of free formation of public opinion which is inherent in our Constitution. Political Americans, per contra, may well be committed to religious beliefs and practices which transcend and provide spiritual and moral direction to our politics.

It is not intended here to offer this account as literally endorsed by Mr. Justice Black, but it seems to be fundamentally congruent with his opinions in a series of critical cases dealing with religion. It appears, however, to be at odds with the developing trend of the Burger Court. Both the absolutism of Mr. Justice Black and his particular conceptions of religion's relation to government seem, on the whole, to wane in influence as the Burger Court takes shape. The divergence is neither wholesale nor characteristic of all members of the present Court. But in both general principles and their application in significant cases the heritage of Mr. Justice Black appears presently to receive a somewhat skeptical attention. The present Court expressly abjures "absolutism"; it "balances" or "accommodates" the first amendment provisions which Mr. Justice Black regarded as unqualified; it tends to stress individual or state considerations rather than the commands of the federal constitutional requirements; and it is committed to conventional rather than the more reflective conceptions of religion developed in Mr. Justice Black's thinking. To explain these assertions, to consider why the divergence has taken place, and to argue for adherence to Mr. Justice Black's position will be the undertaking of the discussion which follows.

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[10]*See* Time, Inc. v. Hill, 385 U.S. 374, 399-401 (1967) (Black, J., concurring); *cf.* Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting) ("[The Amendments] sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men.").

II. Mr. Justice Black's Interpretation of the Religion Clauses

In 1968 Mr. Justice Black declared that he had stated his position as to the interpretation of the religion clauses in *Everson v. Board of Education* more than twenty years before.

> Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between church and state."[11]

In *Everson* he concluded that the payment of public money for bus fares to sectarian schools was constitutional;[12] in succeeding cases he condemned as unconstitutional "released-time" arrangements in public schools, whether on or off school property;[13] reciting prayers[14] and reading the Bible in those schools;[15] and lending textbooks, financed with public funds, to students in sectarian as well as public schools.[16] In his last year on the Court he recorded once again his belief in the unconstitutionality of public financial aid to sectarian

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[11]Everson v. Board of Educ., 330 U.S. at 15-16 (Black, J.) (5-4 decision), *quoted with approval in* A Constitutional Faith, *supra* note 6, at 44.

[12]*Id.* at 17-18; see text following note 20 *infra.*

[13]Zorach v. Clauson, 343 U.S. 306, 315-20 (1952) (Black, J., dissenting); see text accompanying notes 31-32 and notes 35-36 *infra;* McCollum v. Board of Educ., 333 U.S. 203, 209-12 (1948) (Black, J.).

[14]Engel v. Vitale, 370 U.S. 421, 424, 430, 436 (1962) (Black, J.); see text accompanying notes 33-34 *infra.*

[15]School Dist. v. Schempp, 374 U.S. 203, 223-27 (1963) (Clark, J.). The Chief Justice and Justices Black, Douglas, Brennan, Harlan, Goldberg, and White joined in the opinion of the Court.

[16]Board of Educ. v. Allen, 392 U.S. at 253-54 (Black, J., dissenting); see text accompanying notes 37-41 and 81-84 *infra.* Justices Douglas and Fortas filed separate dissenting opinions in *Allen.*

schools and colleges.[17] In the preceding year he concurred without comment in the opinion of Chief Justice Burger upholding the New York tax exemption of church properties.[18] Two cases involving the religious basis for legitimate conscientious objection also must be noted: *Welsh v. United States*, in which Mr. Justice Black interpreted "religion," in practical rather than conventional terms, as a deep and persisting moral conviction,[19] and *Gillette v. United States*, in which he accepted the Court's rejection of a conscientious objector claim based upon a selective denunciation of a particular war, *i.e.*, the Vietnam War.[20]

Mr. Justice Black's opinion in *Everson* was direct and uncompromising. The religion clauses of the first amendment, Black wrote, are, like the political clauses, to be taken as meaning what they say: any action, federal or state, which aids or inhibits the exercise of religion is forbidden by the first amendment. The reimbursement of bus fares authorized in New Jersey helps children go to school, which is a public function and indeed mandated by law. Such an expenditure of public funds may incidentally reduce the cost of operating parochial schools, in that parents who need not pay the fares out of their own pockets can contribute the money to the school for other activities, including conceivably religious activities. But that is beside the point. Serving the public interest by transporting the children to school has the same general importance to the public as providing police or fire protection.[21] Riding in school buses has no special religious overtones; it is not the occasion for a religious ceremony, any more than putting out fires or maintaining public order. To conceive of such transportation as sectarian would be like characterizing fire protection as involving the recital of prayers or police protection as embodying a command of the Old or New Testament.

In view of Mr. Justice Black's concern to avoid interpreting constitutional provisions as matters of degree, it is of interest that he noted that state aid was not to be judged unconstitutional "if it is

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[17]Tilton v. Richardson, 403 U.S. 672, 689-97 (1971) (Douglas & Black & Marshall, JJ., dissenting in part); see text accompanying notes 54-58 *infra;* Lemon v. Kurtzman, 403 U.S. 602, 627-42 (1971) (Douglas & Black, JJ., concurring); see text accompanying notes 47-53 *infra.*

[18]Walz v. Tax Comm'n, 397 U.S. at 672-80 (Burger, C.J.); see text accompanying notes 42-46 *infra.*

[19]398 U.S. 333, 340, 342-44 (1970) (Black, J.); see text accompanying notes 126-29 *infra.*

[20]401 U.S. 437, 463 (1971) (Black, J., concurring in judgment and Part I of Court's opinion); see text accompanying notes 130-31 *infra.*

[21]Everson v. Board of Educ., 330 U.S. at 16-18.

within the State's constitutional power even though it approaches the verge of that power."[22] He was responding, clearly, to a concluding footnote in the Rutledge dissent to the effect that New Jersey's action did in fact "[approach] the verge of her power."[23] Whether he accepted that description by Mr. Justice Rutledge seems open to question; but in any case, the critical question was not one of degree but whether New Jersey's power was or was not constitutionally transgressed. If it were not, then there was no establishment of religion even though incidentally religious activities might be assisted.

In addition to defining the issues sharply, the Rutledge dissent in *Everson* developed most of the arguments which have been advanced in recent cases on aid to religious institutions of learning. Taking its cue from Madison's injunction to take alarm at the first threat of infringement of our liberties, the dissent asserted that parochial education is indissoluble, that a separation of sacred and secular elements is inadmissible.[24] To help any part of such education is thus to promote religion, and to speak of "just a little case over bus fares" is to display that lack of vigilance which Madison's *Remonstrance* condemned.[25] The argument between majority and dissent turned upon the assertion of inseparability of religious and secular elements in sectarian education. Mr. Justice Black did in later cases acknowledge such inseparability *within* the schools.[26] But he found publicly financed transportation, like other public services, devoid of religious implications. He would, we may suppose, have found such implications in the event that special expenses had to be incurred because of special locations or schedules of sectarian schools. But absent these, the provision of subsidized bus fares must be equal for all children of school age.

Such a generalized principle of public interest had been the premise of *Pierce v. Society of Sisters*[27] accepting parochial schools as equal to public schools for satisfaction of Oregon's compulsory education law. *Pierce* had not been argued expressly in terms of religion, but rather of the right of parents to satisfy the requirement according to their private convictions.[28] The Court found that private

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[22]*Id.* at 16.

[23]*Id.* at 62 n.61 (Rutledge & Frankfurter & Jackson & Burton, JJ., dissenting).

[24]*Id.* at 45-48 (dissenting opinion) (citing *Madison, Memorial and Remonstrance Against Religious Assessments, reprinted in* Everson v. Board of Educ., 330 U.S. at 63-72).

[25]*Id.* at 57.

[26]*See* Board of Educ. v. Allen, 392 U.S. at 252 (1968) (Black, J., dissenting).

[27]268 U.S. 510 (1925).

[28]*See* School Dist. v. Schempp, 374 U.S. at 248 (Brennan, J., concurring) ("[*Pierce*] obviously decided no First Amendment question but recognized only the

schools, whether or not sectarian, might provide the basic education appropriate for citizens-to-be. Such education might or might not be religious as well. Quantitatively the secular component might vary according to the time and attention given to purely religious instruction, but at least the secular elements could be identified with sufficient firmness to accredit the school. The Rutledge dissent in *Everson* did not challenge the Court's holding in *Pierce*, though the holding might have been rejected by Thomas Jefferson. But if the *Pierce* ruling were accepted, then it may be invoked to justify distinguishing the secular and religious elements of sectarian education, so as to assure secular education in the parochial school.

The *Everson* statement of Mr. Justice Black's position was further developed in a number of other major cases. In *West Virginia State Board of Education v. Barnett* he had insisted, in conflict with Mr. Justice Frankfurter, that the free exercise of religion included such conduct as the physical gesture of saluting the flag as well as holding a given inner conviction.[29] Three years earlier respect for state autonomy had persuaded him to accept, rather than reject, this compulsory patriotic ceremony.[30] Mr. Justice Black took the position in *McCollum v. Board of Education*[31] and *Zorach v. Clauson*[32] that free exercise requirements could not justify released-time arrangements providing for religious instruction during school hours, whether on school property or elsewhere, for these violated the establishment clause by invoking the state's truancy power to assure pupils' attendance at religious sessions. For similar reasons in *Engel v. Vitale*[33] and *School District v. Schempp*,[34] respectively, he concluded that nondenominational prayers and Bible-reading in public schools were unconstitutional. Arguments based on the need for cooperation between church and state did not seem to Mr. Justice Black to be in keeping with our best traditions, as the majority

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constitutional right to establish and patronize private schools—including parochial schools—which meet the state's reasonable minimum curricular requirements.").

[29]319 U.S. 624, 643-44 (1943) (Black, J., concurring). Mr. Justice Frankfurter was the sole dissenter to the Court's holding that the flag salute, like test oaths, was an instrument for restricting religious belief.

[30]Minersville School Dist. v. Gobitis, 310 U.S. 586 (1940) (Frankfurter, J.). Mr. Justice Stone was the only member of the Court to dissent to the holding that a state regulation requiring those attending public schools to participate in a daily flag salute ceremony, on pain of expulsion, is not unconstitutional as applied to children entertaining a conscientious religious belief that such conduct is forbidden by the Bible.

[31]333 U.S. at 209-10 (Black, J.).

[32]343 U.S. at 316-18 (Black, J., dissenting).

[33]370 U.S. at 424, 430-36 (Black, J.).

[34]374 U.S. at 223-27 (Mr. Justice Black joined in the Court's opinion).

claimed in *Zorach*, but reflected a "soft euphemism" that disguised government's improper intrusion into the religious sphere.[35]

Mr. Justice Black's positive conception of religious freedom was set forth eloquently in the concluding paragraph of his dissent in *Zorach*:

> Under our system of religious freedom, people have gone to their religious sanctuaries not because they feared the law but because they loved their God. The choice of all has been as free as the choice of those who answered the call to worship moved only by the music of the old Sunday morning church bells. The spiritual mind of man has thus been free to believe, disbelieve, or doubt, without repression, great or small, by the heavy hand of government. Statutes authorizing such repression have been stricken. Before today, our judicial opinions have refrained from drawing invidious distinctions between those who believe in no religion and those who do believe. The First Amendment has lost much if the religious follower and the atheist are no longer to be judicially regarded as entitled to equal justice under law.
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> State help to religion injects political and party prejudices into a holy field. It too often substitutes force for prayer, hate for love, and persecution for persuasion. Government should not be allowed, under cover of the soft euphemism of "co-operation," to steal into the sacred area of religious choice.[36]

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[35]Zorach v. Clauson, 343 U.S. at 320 (Black, J., dissenting).

[36]*Id.* at 319-20.

When in December of 1976 decorations were erected in Indianapolis' University Park, the traditional nativity scene was not among them, a fact attributed by some, but not all, to "demands [of non-responsive and non-representative persons] which violate the conscience of the majority of our constituency." Indianapolis City-County Council Proposal No. 604, Special Resolution No. 19 (Dec. 20, 1976); *contra*, Memorandum from William H. Hudnut III, Mayor, to City-County Council regarding Special Resolution No. 604 (Dec. 21, 1976). The "demands" to which the City-County Council was referring are embodied in the following statement:

> While some aspects of Christmas celebrations are traditional and secular, manger scenes are clearly associated with the Christian religious holiday. Use of public resources to install and maintain such a display on public land is offensive to non-Christian citizens and appears to constitute a violation of First Amendment prohibitions of establishment of religion. We would urge you to see that, when December decorations are erected in the Park this year, they do not include such obvious Christian religious symbols.

Letter from Barbara Williamson, Executive Director, Indiana Civil Liberties Union, and Emily Fink, Executive Director, Jewish Community Relations Council in Indianapolis, to Ray Crowe, Director, Indianapolis Parks Department (November 1976).

Regardless of its impact on the Parks Department once the ICLU-JCRC request was made public by city officials, it evoked a huge media controversy and prompted a

The principal defeat suffered by Mr. Justice Black during the Warren Court years insofar as the religion clauses were concerned was in *Board of Education v. Allen*,[37] where the Court sustained a New York statute authorizing the loan of textbooks in secular subjects to pupils in sectarian as well as public schools. Mr. Justice Black protested that textbooks, in contrast with public services such as bus fares, school lunches, and police and fire protection, are central to the teaching process.[38] He left to the Douglas dissent the discussion of the pervasiveness of Catholic doctrine in all subjects—social, scientific, humanistic—taught in parochial schools,[39] and limited his own argument to the proposition that:

City-County Council Resolution, a bill in the Indiana General Assembly, Ind. H.R. 1224 (Jan. 5, 1977) and a policy from the mayor on the use of public property for such displays, Open Letter to The Community from Mayor William H. Hudnut, III regarding The Navity Scene on Public Property (Feb. 18, 1977). "The City respects all faiths and recognizes and defends people's inalienable right, individually and collectively, to express their beliefs freely. The City will not promote participation in the activities of any particular religious organizations or sect, nor will it seek to establish or control religion. The City is neutral." *Id.*

The recent controversy in Indianapolis over the use of public property for religious displays would, I believe, have elicited from Mr. Justice Black the following reactions:

(1) The deep feelings expressed in many letters to the press reveal once more the wisdom of the Founders in affirming in the first amendment the exclusion of religious matters from politics and of political influence from religion.

(2) The use of public money or public property in the religious displays violates the first amendment just as did the programs of released-time on school property in *McCollum v. Board of Education.*

(3) The opening of public parks and streets to religious displays which are entirely financed or supported by private groups might be admissible provided genuine equality of opportunity were accorded to all religious groups as well as to anti-religious groups. Assurances of such equality would have to be attended by successful avoidance of religious antagonisms or "excessive entanglement" by public authority.

(4) Recognition of Christmas as a public holiday can be justified on secular grounds, just as can Sunday closing laws as applied to public institutions and private businesses.

(5) Separation of political and religious institutions does not express hostility to religion, but rather dedication to free exercise of religion.

> A manifestation of such hostility would be at war with our national tradition as embodied in the First Amendment's guaranty of the free exercise of religion. For the First Amendment rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere.

McCollum v. Board of Educ., 333 U.S. at 211-12 (Black, J.).

[37]392 U.S. 236 (1968) (6-3 decision) (White, J.). Justices Black, Douglas, and Fortas filed separate dissenting opinions in which each asserted that the challenged state statute was unconstitutional as a law respecting the establishment of religion.

[38]*Id.* at 252 (Black, J., dissenting).

[39]*Id.* at 258-65 (Douglas, J., dissenting).

> Books are the most essential tool of education since they contain the resources of knowledge which the educational process is designed to exploit. In this sense it is not difficult to distinguish books, which are the heart of any school, from bus fares, which provide a convenient and helpful general public transportation service.[40]

He rejected the majority's conclusion that the financial benefit could be justified because it aided parents and children rather than the schools. The crucial issue was not which persons benefited, but whether the benefit did or did not involve a general public purpose distinct from the promotion of religion.[41]

Other important cases involving religion were decided during 1969-71, the period when Mr. Justice Black's tenure overlapped the term of Chief Justice Burger. In *Walz v. New York Tax Commission*,[42] a case decided in 1970, Mr. Justice Black concurred silently in the opinion by the Chief Justice sustaining the according of tax exemptions to religious properties. Only Mr. Justice Douglas dissented; to him a tax examption is indistinguishable from a public subsidy.[43] It seems uncertain whether Mr. Justice Black would have taken issue with this position; on the positive side he may be supposed to have concurred in associating churches with other properties exempted because they promote " 'moral or mental improvement.' "[44] It is doubtful that he agreed with the Chief Justice's stress on the Holmes dictum that " 'a page of history is worth a volume of logic.' "[45] Mr. Justice Black was devoted to history, provided it was the history of the Founders' formulation of constitutional principles, but hardly to history at large. He must also have shaken his head at the Chief Justice's praise of the realistic nonlogic of the *Everson* decision.[46]

In the following year the Court confronted the major problems involved in federal and state efforts to provide assistance to parochial education. Mr. Justice Black reiterated in these cases his distinction between nonideological public forms of assistance and direct

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[40]*Id.* at 252-53 (Black, J., dissenting).

[41]The "child benefit" argument, which often is traced to the opinion of Chief Justice Hughes in Cochran v. Louisiana State Bd. of Educ., 281 U.S. 370 (1930), is surely inadequate, for if it is a secular benefit that is bestowed then there is no establishment of religion, but if the benefit is religious then there is establishment. The criterion is the presence of a legitimating public secular interest.

[42]397 U.S. 664 (1970) (Burger, C.J.).

[43]*Id.* at 704, 709 (Douglas, J., dissenting).

[44]*Id.* at 672 (Burger, C.J.).

[45]*Id.* at 675-76 (Burger, C.J.) *quoting* New York Trust Co. v. Eisner, 256 U.S. 345, 349 (1921).

[46]397 U.S. at 671 (Burger, C.J.).

promotion of religious teaching in private schools and colleges. In *Lemon v. Kurtzman*[47] he was in the majority in striking down programs in Rhode Island and Pennsylvania which provided for payments to nonpublic schools for textbooks, instructional materials, and teachers' salaries. He joined in the concurring opinion of Mr. Justice Douglas asserting that secular teaching in such schools cannot be separated from religious teaching and that the aid, ostensibly limited to secular uses, would enable those schools to put more money into religious teaching.[48] To police teaching in order to assure its secular character would involve undue entanglement;[49] furthermore, taxpayers' free exercise was abridged when public money was employed to promote a private religious objective.[50] Taking note of the rapid increase in the 1960's of state and federal aid to private colleges and universities, Mr. Justice Douglas rejected the contention that the widely-praised objective of variety in education is necessarily promoted by aiding sectarian education.[51] In fact, he argued, if sectarian schools accept public aid, then they must give up school prayers under the *Engel* decision.[52] In summary he stressed the unity of parochial education: "The school is an organism living on one budget" and each class, whether in history, literature, or science is a part of that organic whole.[53]

In *Tilton v. Richardson*,[54] a case decided on the same day as *Lemon v. Kurtzman*, the Court held that the Higher Education Facilities Act of 1963 was constitutional in respect of its authorizing federal aid for buildings at church-related colleges. This case fairly illustrates the division between the liberal Warren Court members and the new Chief Justice. The Douglas dissent, in which Mr. Justice Black joined, asserted that grants to sectarian colleges to build libraries, a language laboratory, a science building, and a music, drama, and arts building were indistinguishable from grants to subsidize teaching in church-related primary and secondary schools.[55] The dissenters rejected the claim that religious teaching in church-related colleges did not involve indoctrination of the sort which the first amendment forbids promoting by public means.[56]

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[47]403 U.S. 602 (1971) (Burger, C.J.). Only Mr. Justice White dissented in *Lemon v. Kurtzman*.

[48]*Id.* at 630 n.13, 641.

[49]*Id.* at 627 (Douglas & Black, JJ., concurring).

[50]*Id.* at 627-28, 641-42 (Douglas & Black, JJ., concurring).

[51]*Id.* at 630-31 (concurring opinion).

[52]*Id.* at 634 (concurring opinion).

[53]*Id.* at 641 (concurring opinion).

[54]403 U.S. 672 (1971) (Burger, C.J.). June 28, 1971, the date of decision of these two cases, was the last day of Mr. Justice Black's active service on the Court.

[55]*Id.* at 692-93 (Douglas & Black & Marshall, JJ., dissenting).

[56]*Id.* at 693-94.

Quoting a statement of President Kennedy to the effect that aid to the school is prohibited by the Constitution,[57] the dissent stressed both the impact of the grants in making the parochial system viable and the problems involved in the strictest supervision and surveillance to assure secular use of "a unitary institution with subtle blending of sectarian and secular instruction."[58]

III. The Religion Clauses in the Burger Court

The Burger Court generally has diverged from the Black position with respect to the religion clauses. Absolutism and activism in applying constitutional restrictions on state and local initiatives have been respectfully put to one side. The Court, however, has not been monolithic, and the Chief Justice, who has come to be associated normally with Justices Rehnquist and White, has not always been in the majority. It seems, nevertheless, appropriate to identify the Court's general approach with the opinion of the Chief Justice in *Walz*, the New York tax exemption case.

> The Establishment and Free Exercise Clauses of the First Amendment are not the most precisely drawn portions of the Constitution. The sweep of the absolute prohibitions in the Religion Clauses may have been calculated; but the purpose was to state an objective, not to write a statute. In attempting to articulate the scope of the two Religion Clauses, the Court's opinions reflect the limitations inherent in formulating general principles on a case-by-case basis. The considerable internal inconsistency in the opinions of the Court derives from what, in retrospect, may have been too sweeping utterances on aspects of these clauses that seemed clear in relation to the particular cases but have limited meaning as general principles.[59]

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[57]*Id.* at 690 (quoting March 1, 1961 News Conference, [1961] Pub. Papers 142-43).

[58]*Id.* at 694 (Douglas & Black & Marshall, JJ., dissenting). Mr. Justice Brennan argued that the case should be remanded to determine whether the colleges were in fact sectarian. 403 U.S. at 642 (dissenting opinion). He contrasted the block grant as a positive aid with the negative aid involved in a tax exemption, *id.* at 652-57; and declared that, in contrast with *Allen*, the New York textbook case, the aid provided in *Lemon* and *Tilton* was to education that "goes hand in hand with the religious mission that is the only reason for the schools' existence." *Id.* at 657. Mr. Justice White rejected the distinction between higher and secondary education in respect of indoctrination, but found the statute valid because it was based on an admissible separation of secular and sectarian purposes. *Id.* at 670-71 (concurring opinion).

[59]397 U.S. at 668. Mr. Justice Black may be presumed to have distinguished statutes from the Constitution. But it seems unlikely that he would have regarded the

Such an injunction against undue generality has obvious appeal, but it would have, for Mr. Justice Black, limited validity when applied to first amendment principles. Although he concurred in the opinion of the Chief Justice in *Walz*, Mr. Justice Black was committed to the straightforward and absolute interpretation of the religion clauses. He could not agree that judges may balance or accommodate those clauses against other considerations in the cases at hand. He would contend that "Congress shall make no law respecting an establishment of religion" has been replaced by "Congress shall make no law . . . *except when* historical usage or some other social factor makes such a law desirable." If this analysis is correct, Mr. Justice Black accepted the constitutionality of tax exemption on the basis, similar to that advanced by Mr. Justice Brennan, that a distinction can be drawn between exemption and subsidy and, more important, that religion shares with the arts and sciences and other mental and moral improvement activities such public value as to merit special tax treatment. On the negative side, it seems clear that Mr. Justice Black rejected the contention that any governmental act which saves money for a church or church school is ipso facto "establishment." Public or general functions can be identified, and to advance them does not violate the constitutional prohibition.

The anti-absolutism of Chief Justice Burger was expressed again in *Wisconsin v. Yoder*,[60] after Mr. Justice Black had left the Court. In *Yoder* the free exercise clause was invoked to justify exempting Amish children from Wisconsin's compulsory school-attendance requirement after primary school. The Chief Justice wrote that:

"[A] State's interest in universal education, however highly we rank it, is not totally free from a balancing process when it impinges on fundamental rights and interests, such as those specifically protected by the Free Exercise Clause of the First Amendment. . . ."[61] And again: "[O]nly those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion."[62]

Free exercise, however fundamental, must be weighed, and may be outweighed. In his balancing, the Chief Justice concluded that the

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Constitution as simply "stat[ing] an objective." The words of the Constitution, while indeed normative, were considered by Black to provide precise though general imperatives for the conduct of government.

[60]406 U.S. 205 (1972) (Burger, C.J.). Mr. Justice Powell and Mr. Justice Rehnquist did not participate in the consideration or decision of this case.

[61]*Id.* at 214.

[62]*Id.* at 215.

Amish claim must not be "based on purely secular considerations,"[63] but rather that it must be a matter of "deep religious conviction."[64] He noted that the social progress all around the Amish has put their way of life under increasing strain, especially at the level of high school education.[65] The Court rejected Wisconsin's argument that the free exercise clause protects only beliefs, not conduct, and also the argument that to exempt the Amish would desert neutrality in imposing the state requirement.[66] The *Walz* stress on "preserving doctrinal flexibility and recognizing the need for a sensible and realistic application of the Religion Clauses" was reiterated.[67] The opinion examined and rejected Wisconsin's contention that sending Amish children to high school for two years would serve significantly to prepare them "to participate effectively and intelligently in our open political system."[68] In fact, the opinion concluded, the Amish system of learning-by-doing in the fifteenth and sixteenth years has been described by experts as preparing the children very well for life in the Amish community.[69] The Amish parents' right to control their children's development in this respect is not at all comparable to the asserted right, rejected by the Supreme Court, of parents to employ their children to propagandize religion on the streets.[70] As a final point, the Court noted that its holding was not intended to preclude the state's establishing reasonable standards for continuing vocational education of the children.[71]

There were no dissenters to the principal holding in *Yoder;* however, Mr. Justice Douglas did qualify his assent to the Court's holding. It was his belief that the free exercise at issue was that of the children as well as of their parents and that inadequate attention had been given to considering the children's own views.[72] Mr. Justice Douglas also criticized the Chief Justice's account of religion as returning the Court to a conventional conception rather than the more expansive interpretation advanced in the conscientious objector cases.[73] Mr. Justice Stewart, for himself and Mr. Justice Brennan,

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[63]*Id.*

[64]*Id.* at 216. *Cf.* Gillette v. United States, 401 U.S. 437 (1971) (significance of religious conviction in conscientious objector case); Welsh v. United States, 398 U.S. 333 (1970) (religion interpreted as practically a deep and persisting moral conviction).

[65]406 U.S. at 217.

[66]*Id.* at 219-20.

[67]*Id.* at 221.

[68]*Id.* at 221-22.

[69]*Id.* at 223.

[70]*Compare Yoder with* Prince v. Massachusetts, 321 U.S. 158 (1944).

[71]406 U.S. at 236.

[72]*Id.* at 241 (Douglas, J., dissenting in part). Douglas would have remanded the case with respect to two children to determine their preference.

[73]*Id.* at 248.

noted that the matter of the children's free choice had not been presented in the record.[74] Mr. Justice White, joined by Justices Brennan and Stewart, balanced the free exercise of the Amish against the state interest and found that the former prevailed.[75]

The decisive confrontation between Mr. Justice Black's position and that which was later to prevail in the Burger Court occurred, in retrospect, in *Board of Education v. Allen* in 1966. The disagreement between the six-man majority and the dissenters, Justices Black, Douglas, and Fortas, took the form of a dispute over the meaning of Mr. Justice Black's opinion in *Everson.*[76] Mr. Justice White, writing for the majority, found that supplying textbooks was in principle of the same order as paying bus transportation, *i.e.*, a secular service generally available to all pupils.[77] Secular textbooks could, the majority held, be distinguished from religious textbooks.[78] The beneficiaries of the program were the pupils and their parents, not the school.[79] If pupils are helped to go to parochial school by textbook loans, so are they by bus fares at the taxpayers' expense. Thus, Mr. Justice White concluded, the *Everson* criteria as refined in *Schempp* might be satisfactorily applied to justify the textbook loans: the purpose of the lending program was secular, and its primary effect neither advanced nor inhibited religion.[80]

In dissent, Mr. Justice Black characterized the textbook lending program as a "flat, flagrant, open violation of the First and Fourteenth Amendments" as those are related to laws " 'respecting

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[74]*Id.* at 237 (concurring opinion).

[75]*Id.* at 237-41 (concurring opinion).

[76]*Compare* Board of Educ. v. Allen, 392 U.S. at 241-43 (White, J.) *with* 392 U.S. at 250-51 (Black, J., dissenting) *and* 392 U.S. at 254 & n.1, 257 (Douglas, J., dissenting) *and* 392 U.S. at 271-72 (Fortas, J., dissenting).

[77]*Id.* at 242-43.

[78]*Id.* at 244-45.

[79]*Id.* at 243-44.

[80]*Id.* at 243. The test developed in *Schempp* for distinguishing between those state contacts with religion which are forbidden and those which are not was stated as follows:

> [W]hat are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion.

374 U.S. at 222 (Clark, J.). This test was based on the Court's opinions in *Everson, Zorach,* and other cases. Board of Educ. v. Allen, 392 U.S. at 242-43.

In *Allen* Mr. Justice White did not refer to the excessive entanglement test, which was articulated in *Walz* by Chief Justice Burger and recently criticized by Mr. Justice White as redundant. Roemer v. Board of Pub. Works, 426 U.S. 736, 769 (1976) (White, J., concurring in judgment).

an establishment of religion.' "[81] Repeating the main thesis of his *Everson* opinion, he declared that taxpayers were compelled "to support the agencies of private religious organizations the taxpayers oppose."[82] Such a linkage of state and church was what the religion clauses were meant to prevent. As Douglas argued more fully, the distinction between secular and religious textbooks in the religious schools is untenable.[83] Mr. Justice Black's dissent in *Allen* concluded prophetically:

> [O]n the argument used to support this law others could be upheld providing for state or federal government funds to buy property on which to erect religious school buildings or to erect the buildings themselves, to pay the salaries of the religious school teachers, and finally to have the sectarian religious groups cease to rely on voluntary contributions of members of their sects while waiting for the Government to pick up all the bills for the religious schools.[84]

He noted the passage in 1963 of the Higher Education Facilities Act, which appeared to authorize the expenditure of federal funds for the construction of buildings for sectarian religious schools and which was subsequently to be upheld in *Tilton* over his dissent.[85]

The stage thus was set for the mixture of adherence to the Black position and departure from it which has characterized the Burger Court. The anti-Black position has been taken, in the main, by Mr. Justice White, in association with the Chief Justice and Mr. Justice Rehnquist. A mediating stance has been assumed by Justices Powell and Blackmun and, sometimes, Stewart. The position closest to that of Mr. Justice Black has been that of Mr. Justice Brennan, usually with the concurrence of Mr. Justice Marshall; though it should be kept in mind that in *Allen* Mr. Justice Brennan sided with the majority.

Allen was the first in a series of cases dealing with legislative efforts at both state and federal levels, to include sectarian schools and colleges in programs of financial aid. Some of these efforts took the form of aid to pupils via tuition grants; others provided tax credits or reimbursement to parents; others supplemented teachers' salaries in schools unable to pay prevailing salary scales. They also included loans or grants for administration and instructional mater-

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[81] 392 U.S. at 250.
[82] *Id.* at 251.
[83] *Id.* at 254 (dissenting opinion).
[84] *Id.* at 253.
[85] *Id.*

ials and for construction of buildings intended for non-religious employment. As of June 1976 the position of the Burger Court on these programs may be summarized as follows:

In 1971 while Mr. Justice Black still was on the Court, Chief Justice Burger handed down a decision condemning as unconstitutional Rhode Island and Pennsylvania statutes providing for the states' making payments to supplement the salaries of teachers of secular subjects in parochial schools; the Court's opinion in *Lemon v. Kurtzman* cited the danger of excessive entanglement of state with church.[86] Mr. Justice Douglas, with Mr. Justice Black, agreed that undue surveillance would be required to see that the aid did not go to religious teaching.[87]

But in *Tilton v. Richardson*, a companion case involving sectarian colleges in Connecticut, the Court upheld a one-time money grant authorized under the federal Higher Education Facilities Act of 1963 for buildings to be employed only for secular purposes.[88] Justices Douglas, Black, Marshall, and Brennan dissented on the ground that assuring restriction of the buildings to secular uses would entail such surveillance as to violate the establishment clause.[89]

A second round of decisions was handed down two years later; Justices Powell and Rehnquist had replaced, respectively, Justices Black and Harlan. In *Committee for Public Education & Religious Liberty v. Nyquist*[90] the Court struck down New York's plan to provide public moneys for maintenance and repair grants, as well as tuition reimbursement and tax relief. The Powell opinion declared that all of these might be employed in sectarian enterprises and were not saved by such arrangements as paying parents rather than the schools.[91] Conceding the merits of trying to help poorer parents and to encourage private schools, Mr. Justice Powell noted Mr. Justice Black's *Everson* warning about the dangers of political divisiveness when contending sects struggle to tap the public purse.[92] Mr. Justice Rehnquist found the Court's decision inconsistent with approving bus fares, textbook loans, and tax exemptions, all of which, he contended, aided parents as much as the tuition grants at issue in *Nyquist*.[93]

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[86]403 U.S. at 624-25.

[87]*Id.* at 634 (concurring opinion).

[88]403 U.S. 672 (1971). Justices Harlan, Stewart, and Blackmun joined in the Chief Justice's plurality opinion; Mr. Justice White concurred in the judgment.

[89]*Id.* at 694 (Douglas & Black Marshall, JJ., dissenting); *id.* at 651 (Brennan, J., dissenting).

[90]413 U.S. 756 (1973) (Powell, J.). Justices Douglas, Brennan, Stewart, Marshall and Blackmun joined in the Court's opinion. Dissenting in part were Justices Burger, see note 99 *infra* and accompanying text; White, see notes 101-03 *infra* and accompanying text; and Rehnquist.

[91]*Id.* at 780-89.

[92]*Id.* at 795-96.

[93]*Id.* at 806-12 (dissenting opinion).

On the same day *Levitt v. Committee for Public Education & Religious Liberty*[94] was decided. In this case the Court, speaking through the Chief Justice, declared invalid New York's spending $28 million to reimburse private schools for administering and keeping records on tests, enrollment, pupil health, and personnel. Such aids, the Court ruled, could not readily be separated from infusing religion into the teaching process.[95] As distinct from *Allen*, here the issue was not a text whose " 'content is ascertainable, but a teacher's handling of a subject.'"[96] Justices Douglas, Brennan, and Marshall concurred, and only Mr. Justice White dissented.

A third decision on the same day split the Court. A six-man majority held in *Sloan v. Lemon*[97] that Pennsylvania could not reimburse parents for part of the tuition paid to parochial schools; the reimbursement could be viewed as potentially applied to religious instruction. Parental benefit, like child benefit, was rejected as a justification for public spending; the crucial issue was whether the benefit was religious.[98] Chief Justice Burger and Justices White and Rehnquist dissented. The Chief Justice argued that the aid to schools was incidental; when individuals make the choice as to how money is to be spent "the balance between the policies of free exercise and establishment of religion tips in favor of the former . . . and takes on the character of general aid to individual families."[99] In addition, he stressed the importance of promoting educational pluralism.[100] Mr. Justice White argued that the secular purposes here were sufficient to justify aid;[101] he noted that sectarian education is shrinking in volume[102] and that parental free exercise of religion should be considered.[103]

As in 1971, the Court balanced these rulings in *Hunt v. McNair*[104] to uphold a South Carolina statute authorizing the use of public funds to facilitate the building of a secular-use plant, specifically a dining-

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[94]413 U.S. 472 (1973).

[95]*Id.* at 480.

[96]*Id.* at 481, *quoting* Lemon v. Kurtzman, 403 U.S. at 617.

[97]413 U.S. 825 (1973) (Powell, J.).

[98]*Id.* at 832.

[99]*Id.* at 802 (concurring in part and dissenting in part). Mr. Justice Rehnquist joined in this opinion, which also applies to *Nyquist*, while Mr. Justice White did so only in part.

[100]*Id.* at 805.

[101]*Id.* at 813, 823-24 (dissenting opinion). Mr. Justice White was joined in part by the Chief Justice and Mr. Justice Rehnquist in an opinion which is equally applicable to *Nyquist*.

[102]*Id.* at 817.

[103]*Id.* at 814-15.

[104]413 U.S. 734 (1973) (Powell, J.).

hall, at a Baptist college. The majority found that: (1) The purpose of the statute was secular—to promote higher education, (2) the program's primary effect was not religious since religion at the college was not all-pervasive, and (3) no more entanglement was involved than in *Tilton*,[105] the Connecticut colleges case of 1971. Mr. Justice Brennan, in an opinion in which Justices Douglas and Marshall joined, dissented on the score that essentially religious activities were involved in pursuing the secular public purpose and that the program involved continuous on-site inspection of facilities to determine whether they were employed for religious purposes.[106]

Roemer v. Board of Public Works,[107] the final decision to date in this series, concerned sectarian colleges; once again the Court divided, but nonetheless upheld Maryland's grant of public funds to private colleges for secular purposes. In an opinion in which the Chief Justice and Mr. Justice Powell joined, Mr. Justice Blackmun found that "the appellee institutions are not 'so permeated by religion that the secular side cannot be separated from the sectarian.' "[108] For this reason, the primary effect of the grants need not be considered religious, nor need excessive entanglement be involved. Mr. Justice White, with Mr. Justice Rehnquist, concurred in the result but expressed discontent with the plurality's use of the "excessive entanglement" test; it was enough, he said, to show a secular purpose and no primary religious effect.[109] Mr. Justice Brennan, dissenting for himself and Mr. Justice Marshall, stressed the fact that " 'the secular education is provided within the environment of religion,' "[110] and that "general subsidies 'tend to promote that type of interdependence between religion and state which the First Amendment was designed to prevent.' "[111] Mr. Justice Stewart, dissenting, contended that evidence had not been presented sufficient to show that "the compulsory religion courses were taught as an academic

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[105] *Id.* at 741-46.

[106] 413 U.S. at 749-50, 752-55. The dissent criticized energetically the conclusion that *Tilton* was controlling, pointing out that the South Carolina plan involved not a single grant of aid, but continuing assistance which must involve concomitant regulation and surveillance.

[107] 426 U.S. 736 (1976). In Meek v. Pittenger, 421 U.S. 349 (1975), the Court upheld a Pennsylvania statute which provided for lending textbooks to students attending private schools, but found impermissible the loan of instructional materials and equipment and the provision of auxiliary educational services to private schools.

[108] *Id.* at 759, *quoting* Roemer v. Board of Pub. Works, 387 F. Supp. 1282, 1293 (D. Md. 1974).

[109] 426 U.S. at 768-69.

[110] *Id.* at 771-72, *quoting* Lemon v. Kurtzman, 403 U.S. 602, 660 (1971) (Brennan, J., concurring).

[111] *Id.* at 770, *quoting* School Dist. v. Schempp, 374 U.S. 203, 236 (1963) (Brennan, J., concurring).

discipline."[112] Mr. Justice Stevens, in his first religion opinion, supported the Brennan dissent, observing that religious schools should not be pressured to compromise their religious mission.[113]

IV. The Divergent Theories of the Religion Clauses

The reasons for the divergence between Mr. Justice Black and the dominant trend in the Burger Court already have been indicated. It may be that the simplest explanation has been afforded by Mr. Justice Powell's observation that the Court was showing a "sounder balance" than its predecessor.[114] Though Mr. Justice Powell was speaking primarily about criminal cases, his opinions in first amendment cases have shown a like disposition to "balance" where Mr. Justice Black would have been peremptory and, as the rather imprecise term goes, "absolutist."

Why should one be "absolutist"; why should another denounce "absolutism"? Mr. Justice Black's adherence to absolutism issued from his conviction that the Supreme Court can and should read the Constitution as it was intended, and that its meaning, even though not always totally explicit on the surface, can be discerned to be single and internally self-consistent. This does not mean that there is always an easy process of discernment, or that application of constitutional principles always is simple and free from rational disagreements. But it does mean that the constitutional clauses, including the religion clauses, are mutually consistent even when taken to a logical extreme, and that they are not inherently at odds with other principles of the first amendment or of the Constitution more broadly. In the disposition of virtually all the present Court, with the possible exception of Justices Brennan and Marshall, the desire to reject these propositions is the reason for its rejection of the Black heritage in respect to the religion clauses.

Mr. Justice Black believed that the Court's efforts to justify restrictions on free expression in cases involving allegations of libel and censorship committed it to trying to apply unmanageable concepts under the rubrics of "actual malice" and "obscenity."[115] In

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[112]*Id.* at 773.

[113]*Id.* at 775.

[114]N.Y. Times, Aug. 12, 1976, § 1, at 18, col. 3 (statement made at American Bar Association meeting, Aug. 11, 1976).

[115]*See* Ginzburg v. United States, 383 U.S. 463, 478 (1966) (Black, J., dissenting) ("[T]he criteria declared by a majority of the Court today as guidelines for a court or jury to determine whether Ginzburg or anyone else can be punished as a common criminal for publishing or circulating obscene material are so vague and meaningless that they practically leave the fate of a person charged with violating censorship statutes to the unbridled discretion, whim and caprice of the judge or jury which tries

the religion cases the Court, mercifully, has not had to deal with such a problem as the distinction between "sacred" and "profane"; still it has involved itself in wholly unnecessary complications with such criteria as "primary effect" and "excessive entanglement."[116] For Mr. Justice Black, a clear and manageable distinction could be drawn between secular activities, such as those involved in transportation, and the conduct of education involving not only the actual processes of instruction but also the construction and maintenance of facilities essential to them. The concern of Mr. Chief Justice Burger and of his moderate associate, Mr. Justice Powell, has been to assign as much weight as possible to state legislatures and local authorities and to restrain the activist propensity exhibited by Mr. Justice Black. Yet this has, in fact, brought the Justices into elaborate analyses of the precise degree of sectarianism in the institutions being aided.[117] No member of the Supreme Court would confess to legislating; all propose to eschew judicial discretion; and yet it seems that in their devotion to realism, the Justices of the Burger school respond much more than would Mr. Justice Black to the felt need to bend constitutional principles to "the situation."

Are the establishment and the free exercise clauses inherently at odds when taken to their logical extremes? Are they, or is either, in any sense, self-contradictory? In arguing for the former position in *Schempp*, Mr. Justice Stewart noted the possibility that a lone soldier in a remote outpost might need, for his free exercise of religion, the "establishment" of a chaplain, or a chapel.[118] But spending public money for such a facility hardly seems to be "promoting" or "preferring" religion in general or one religion in particular; it is on a level with providing various facilities like libraries or post exchanges.[119] Mr. Justice White has suggested that the very reference to religion in the first amendment is a form of preferring religion to

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him."); New York Times Co. v. Sullivan, 376 U.S. 254, 293 (1964) (Black, J., dissenting) ("[T]he Court holds that 'the Constitution delimits a State's power to award damages for libel in actions brought by public officials against critics of their official conduct.' . . . The Court goes on to hold that a State can subject such critics to damages if 'actual malice' can be proved against them. 'Malice,' even as defined by the Court, is an elusive, abstract concept, hard to prove and hard to disprove. The requirement that malice be proved provides at best an evanescent protection for the right critically to discuss public affairs and certainly does not measure up to the sturdy safeguard embodied in the First Amendment.").

[116]In *Zorach*, Mr. Justice Black took note of the creation of a governmental power to determine "what constitutes 'a religion.' " 343 U.S. at 318 n.4 (dissenting opinion).

[117]*See* Roemer v. Board of Pub. Works, 426 U.S. 736, 755-61 (1976) (Blackmun, J.).

[118]374 U.S. at 309 (dissenting opinion).

[119]Establishing a religious facility to proselytize would exceed the demands of free exercise; on the other hand, providing a facility for worship alone would not seem to be "establishment."

non-religion and so a form of establishment.[120] To this contention Mr. Justice Black surely would have answered that the suggestion ignores the essential character of freedom: if religious freedom is to be genuine it must be accompanied by a like freedom for non-religion.[121]

The divergence between the Black and Burger Court conceptions may, once again, be described in terms of the latter's stress on balancing the religion clauses against one another or other provisions of the Constitution. Such balancing is precisely what Mr. Justice Black condemned in first amendment cases.[122] Decision is made to rest on intuitions regarding matters of competing importance, such as a high school education on one hand and the "good behavior" and sincerity of the embattled Amish on the other. For Mr. Justice Black the question would have been whether free exercise was genuinely involved in *Yoder;* if it were, then the children must go home to their parents' supervision; if not, then the children must attend public high school.

The critical question in *Yoder*, from the absolutist point of view, is whether the constitutional limitation imposed by the free exercise clause was properly invoked to keep the children away from high school. Mr. Justice Black's writings in the school cases do not provide an unequivocal answer. He had found the compulsory flag salute to be an infringement on free exercise; he did not find released-time arrangements mandated by free exercise; however much parents wished to have prayers and Bible-reading in public schools, he did not find such desires an undeniable element of free exercise. On the other hand, he did hold that religious objection to combatant service in war was to be construed with the utmost liberality; and no doubt Amish fathers regarded their children's approach to modern society as a form of combatant experience.

On the whole, the foregoing suggests that Mr. Justice Black might well have refused to accept the Amish appeal to free exercise. Education is not an affair to be left wholly to parents, even when religious education is involved. Parents may not dictate the content or procedure of education in ways which clash with the legitimate interests of the state in training citizens of the future—not because the interest of the state outweighs that of parents, but because parental interest, as a form of free exercise, simply does not reach so far. In *Zorach* Mr. Justice Black condemned the release of public school pupils for religious instruction as an arrangement which

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[120]Welsh v. United States, 398 U.S. at 372 (dissenting opinion) (by implication).

[121]*See, e.g.*, Zorach v. Clauson, 343 U.S. at 320 (Black, J., dissenting); Everson v. Board of Educ., 330 U.S. at 15-16 (Black, J.).

[122]A CONSTITUTIONAL FAITH, *supra* note 6, at 50-52.

invaded the *"sacred area of religious choice."*[123] In the long-established *Pierce* case the Court held that parents might send their children to private schools on condition that appropriate subject matters and teaching procedures were present. The Amish, like any other parents, have the right and the duty to criticize schools, primary or secondary, in respect of their impact on the morality and the mental development of their children. But to withdraw children from the general processes in which citizenship training culminates is to reflect a conception of religion which is negative and narrow; it is also a preferment of a special religion which flies against the establishment clause. Religion which is cultivated exclusively in moral terms, independently of intellectual training, lacks an authentic claim to free exercise in respect of education.[124]

To put the matter polemically, the decisive question in *Yoder* is whether the first two years of high school were in conflict with the religious objectives of the Amish. On this point, one would suppose that the most pertinent evidence would be that supplied by the state educational authorities. To the extent that they could show that their instruction did not, like saluting the flag, commit children to bowing down before the graven image of modern technology, they would escape the charge of invading free exercise. A Justice concerned as Black for religious and intellectual freedom would hardly fail to challenge such representations closely. One may note in passing that the entire issue seems to reflect a practical failure on both sides to arrange for private schools in which both the moral and intellectual development of the children might go forward.

It is characteristic of the divergence between the Black and Burger theories that, in practice, their conclusions are not uniformly and diametrically opposed. Mr. Justice Black concurred in *Walz*, the decision upholding the tax exemption for religious-use properties; and the Burger Court has generally refused to sanction unspecified grants of assistance to primary and secondary sectarian education. The most striking disagreement to date is over aid to sectarian colleges; here the dissents of Mr. Justice Brennan seem to carry forward effectively the Black position. In these cases the Burger Court majority appears to respond to such considerations as the sectarian colleges' need for assistance, the country's need for educational pluralism, and the alleged ability of sectarian college students to resist indoctrination. To these arguments Mr. Justice

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[123]Zorach v. Clauson, 343 U.S. at 320 (Black, J., dissenting) (emphasis added); see text accompanying note 36 *supra*.

[124]One may sympathize with the desire of the Amish to preserve the values of the simple rural life. But why could not Amish high schools be established? Would the Amish have rejected any education involving books?

Brennan responds in very much Mr. Justice Black's spirit that the very raison d'etre of the sectarian colleges is religious and that they play an essential role in the entire scheme of sectarian education, Catholic or otherwise.

The mixture of practical agreement and disagreement between the Black and Burger views of the religion clauses reflects no doubt a mixture of agreement and difference about what "religion" means and how it is to be related to other constitutional provisions. Clearly no Supreme Court Justice can follow a sectarian view of these matters: an explicitly Catholic, Protestant, Jewish, or atheist interpretation cannot be advanced for resolution of Supreme Court issues. However difficult it may be to achieve, a Supreme Court decision must not play favorites among different religions. Somehow a conception of "religion" must be explicated which does not "prefer" any single orthodoxy to any other.

It appears reasonable to distinguish the Black position from that of its opponents, in part, in terms of such a problem of explication. The sensible, realistic approach of Chief Justice Burger proceeds as a working affair with the various sectarian conceptions, adopting in effect a kind of "Roman tolerance" which acknowledges the validity of each provided it does not unduly annoy or harass the others.[125] The Court in *Yoder*, for example, accepted the religious practices of the Amish on their face and yielded deference in the absence of strong evidence of any social disruptions. On the other hand, and notably in *Welsh v. United States*, Mr. Justice Black offered a more comprehensive, if elusive, interpretation of religion as a constitutional concept.[126]

Welsh took to its logical extreme the interpretation of the religious objection exemption to combatant service in the armed forces.[127] Over the objection of the Chief Justice and Justices White

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[125]Rousseau prescribed complete tolerance for all creeds except those which were intolerant.

> Now that there is and can be no longer an exclusive national religion, tolerance should be given to all religions that tolerate others, so long as their dogmas contain nothing contrary to the duties of citizenship. But whoever dares to say: *Outside the Church is no salvation*, ought to be driven from the State, unless the State is the Church, and the prince the pontiff. Such a dogma is good only in a theocratic government; in any other, it is fatal.

J. ROUSSEAU, SOCIAL CONTRACT, bk. IV, ch. VIII, at 122 (E. Dutton ed. 1913) (emphasis in original).

Historically, it was the Christian refusal to be relaxed about non-Christian faiths that presumably brought on the Roman persecutions.

[126]398 U.S. at 342-43.

[127]The conscientious objector exemption extends to one "who, by reason of *religious* training and belief, is conscientiously opposed to participation in war in any form." Universal Military Training and Service Act of 1967, § 1, 50 U.S.C. app. § 456(j) (1970) (emphasis supplied).

and Stewart that the intention of Congress was clearly being obstructed, Mr. Justice Black declared that Welsh's deep-seated conscientious objections, though not theistic or associated with an organized religious sect, were, in effect, equivalent to those asserted by conventional objectors, such as the Quakers, on traditional theological grounds.[128] The Black opinion accepted Welsh's appeal to principles " 'essential to every human relation,' " rather than to a being transcending every human relation.[129] In effect, the Court stood upon a humanistic account of religion which was to be taken as fundamental to all the more particular accounts embraced in organized sectarian beliefs. Though Mr. Justice Black did not explicitly phrase the matter this way, it seems that absolutism in interpreting the religion clauses must find such a broad conception of religion rather than simply dealing separately with each particular creed.

One additional conscientious objector case — *Gillette v. United States*[130] — was decided during Mr. Justice Black's last year of service on the Court. In that case the Court rejected an assertion of conscientious objection to service in the Vietnam War. Mr. Justice Black's concurrence in the opinion written by Mr. Justice Marshall was limited to the principal finding that "Congress intended to exempt persons who oppose participating in all war," therefore, such selective objection was not within the purview of the exemption section of the Selective Service Act.[131] He declined to join in the Court's rejection of claims based explicitly on the establishment and free exercise clauses. Mr. Justice Douglas alone dissented, arguing from the *Welsh* decision and principles advanced in Chief Justice Hughes' dissenting opinion in *United States v. MacIntosh*.[132] It is not fully clear why Mr. Justice Black found the Douglas argument unpersuasive; presumably he regarded selective objection as inherently founded on more than simply conscientious grounds.

V. The Merits in the Black-Burger Argument

The foregoing discussion has reflected a general partiality for the thinking of Mr. Justice Black, though it is to be hoped that the divergence between his views and those of the Burger Court has been

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[128]398 U.S. at 337-43 (Black, J., announcing the judgment of the Court). Mr. Justice Black concluded that *Welsh* was controlled by United States v. Seeger, 380 U.S. 163, 176 (1965), in which the Court held that the test of religious belief under section 6(j) of the Universal Military Training and Service Act is whether it is a sincere and meaningful belief occupying in its possessor's life a place parallel to that filled by the God of those admittedly qualified for the conscientious objector exemption.

[129]398 U.S. at 343.

[130]401 U.S. 437 (1971) (Marshall, J.).

[131]*Id.* at 447, 463.

[132]401 U.S. at 465, 467-68 & n.6.

fairly stated. It is in order, finally, to consider whether a broad theoretical justification may be offered supporting that partiality.

Practically, the divergence has been over whether or not education at college and university levels may receive public assistance even when it is associated with a religious undertaking. The arguments over such aid, as well as over textbook loans at the primary and secondary levels, appear to turn on whether or not secular and sectarian elements of such education can be separated so as to confine public aid to the secular part. The basic argument supporting the Black position is in the conception of religion as pervasive in the classroom and community atmosphere of such institutions. Rather than, so to speak, accepting science classes as secular, as distinct from theology classes as sectarian, Mr. Justice Black viewed religion as providing the general frame and spirit of all the undertakings within the institution.[133] He drew his basic distinction between intellectual and spiritual concerns of schools and colleges on the one hand and accessory services, such as transportation and police and fire protection. And in this he appears to have the more persuasive conception of religion.

It must be stressed that what is here at issue is not the personal religious beliefs held by Mr. Justice Black or any of his colleagues. Rather, the basis of their difference is a divergence about what religion is—specifically, how pervasively religion colors all aspects of human existence. There is an extreme form of pantheism which asserts that divinity inheres in every element of the universe; on the other hand, there are limited conceptions of religion such as that of the Epicureans, who believed the gods are far away and not concerned at all with human affairs. In contrast with these, the religion designated in the first amendment clearly has definite limits and yet is also of paramount human significance. In articulating that significance Mr. Justice Black followed the most comprehensive conception of religion consistent with those boundaries which are affirmed by the major religious bodies in the United States. He maintained inclusiveness without losing discrimination, and definiteness without becoming narrow.

Thus, in *Welsh* Mr. Justice Black endorsed the conception of religion conceived as a deep-going conscientious sensitivity to the dignity of human beings and the sacredness of life. It surely is to his credit that he declined to restrict his argument to a textual analysis of what the Congress may have intended; the Founders, rather than a particular Congress, always were his guide. On the other hand, in

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[133] *See* Board of Educ. v. Allen, 392 U.S. at 251 & n.1 (Black, J., dissenting), 262-66 (Douglas, J., dissenting).

accepting the Court's rejection of selective conscientious objection in *Gillette*, Mr. Justice Black indicated his regard for congressional interpretation provided that it might be shown congruent with the Founders' intention. He was, thus, at once "constitutional" in his basic theory and appropriately respectful of legislative privilege as that is defined in the Constitution.

Arguments on the merits in the field of constitutional interpretation reflect both the absence of full explicitness in the Constitution and also a common understanding that a single meaning can be established for constitutional language. If it is hard to be sure just what the religion clauses mean, it is, nevertheless, imperative that a definite meaning be articulated which commends itself to the thinking of the American public. From this it follows that the religion clauses must be interpreted with full generality—one might indeed say generosity—in the sense of comprehending the widest possible usage of the language involved. "Religion" surely is to be given that breadth of meaning which can embrace all the sects on the American scene as well as those who disavow sectarianism altogether.

It is this comprehensiveness of conception which confers particular merit upon Mr. Justice Black's account of religion in *Welsh*. Conscience, as the common element in all religious experience, conceived as the recognition of moral dignity in oneself and other human beings, is the key to the special status conferred upon religion in the first amendment. Establishment of religion is forbidden, not because religion was considered dangerous, but because only independent and conscientious religion, freely developed by individuals, is genuine religion. This is the valid element of the metaphor of the religious road to salvation. To phrase the point in first amendment terms, *it is precisely because religion must be freely exercised that it may not be established.* And if some creeds hold that for them free exercise means being established and being able to coerce nonbelievers to their ways of belief, the American constitutional rejoinder is that these are not, in the full sense, the religions with which the first amendment is concerned.

The comprehensive view of religion advanced by Mr. Justice Black may be contrasted with the account offered by Chief Justice Burger in *Yoder*. In language reminiscent of pre-*Seeger* conscientious objector cases, the Chief Justice rejected the suggestion that religious claims might rest upon "philosophical and personal" values such as those which Thoreau cultivated at Walden Pond. As Mr. Justice Douglas observed in his partial dissent, this separation between religious and "philosophical" or "moral" values had been transcended in *Seeger;* the Court had acknowledged that genuinely

religious values are continuous with the moral values that give fundamental direction to human life. Conventional theism is not the core of religion as that is relevant in the conscientious objector cases. And it does not appear to be a proper basis, per se, for the release of the Amish from the compulsory high school attendance requirement. Rather, as expressed in *Welsh*, the religion that is relevant is the free development of one's ideas and attitudes toward other people and the world around us. The proper question in *Yoder* was whether the Amish children needed to leave school after the age of fourteen to assure such free development. As suggested above, it seems possible that Mr. Justice Black would have found free religious development as likely to be promoted by their staying two more years in school.

The conception of religion advanced here may be tested by considering whether Mr. Justice Black's general position on aid to sectarian education is consistent with the *Pierce* decision in which the Supreme Court affirmed the propriety of satisfying public education requirements through attendance at parochial schools. As has been pointed out, the parochial school makes complete what is in released-time arrangements only partial; and if Mr. Justice Black condemned the latter, how could he accept the former? One may not, in reply, adopt the tempting suggestion that a decision so fundamental could not be rejected after twenty-five years had confirmed its acceptability, even though such a page of history might seem compelling, though illogical, to the Chief Justice. But one may find a persuasive rationale in the comprehensive conception of religion advanced by Mr. Justice Black. In contrast with exclusively sectarian instruction to be offered in released-time arrangements, the parochial school might be regarded as providing a more general education in which all major components of intellectual training are included. Absent basic instruction in letters, numbers, history, and science, such schools are not accredited; but with that basic instruction they may also teach religion in a context that embraces that general human prospect with which religion in the wider sense is articulated. Such an educational process can develop the intellectual freedom which is the first amendment's central concern. It is not disqualified from the support of the state's truancy power by the fact that it also may serve more narrow sectarian ends.

The merits of Mr. Justice Black's position also may be explicated in terms of his disagreement with Mr. Justice White. The two Justices have looked with disfavor on the criterion of "excessive entanglement" as employed by the Burger Court majority. But their reasons for opposing employment of that criterion were, if a play on words is pardonable, as different as their names. For while both men rejected questions phrased in terms of degree or excess in favor of the

question whether or not a secular purpose was being served, they disagreed deeply in specific cases over whether a given purpose was secular. Thus in *Allen*, the textbook loan case, they disagreed over whether education in the secular sense could be identified and separated from religious education. Mr. Justice White believed that religious education, such as that offered in theology courses, could be demarcated at the classroom door, so to speak, and separated from education in the natural sciences or social sciences or humanities. Per contra, Mr. Justice Black adhered to that conception of education which involved the development of free and independent thinking in all fields of knowledge. As he observed in *Allen*, Mr. Justice Douglas' dissent amply noted the infusion of religious ideas into history, biology, and social science. A religion of serious intention cannot be excluded from any region of human experience.

The religion clauses in the first amendment provide the Supreme Court with perhaps its greatest challenge in interpreting the general charter by which Americans have agreed to be governed. Those clauses invite Americans to consider how their deepest convictions about the world and the human enterprise may be freely developed and put into practice without engendering collisions and hostilities that have disfigured human history. To affirm any given interpretation of what "religion" means in those clauses is to run the risk of disappointing believers in some creed or other. But the lesson cannot be that the Supreme Court should adhere to that conception of religion which is universally inoffensive; such a nominalism would reduce the notion of religion to insignificance. The appropriate interpretation of "religion" must invoke the sense of the first amendment as a whole; it must conceive religion in terms of the free development of the human mind and spirit. It is because he did this so well that Mr. Justice Black provides such effective instruction. He can hardly be said to have formulated the last word, but he put us securely on the right path. As he said at the end of his James Madison Lecture in 1960:

> Since the earliest days philosophers have dreamed of a country where the mind and spirit of man would be free; where there would be no limits to inquiry; where men would be free to explore the unknown and to challenge the most deeply rooted beliefs and principles. Our First Amendment was a bold effort to adopt this principle—to establish a country with no legal restrictions of any kind upon the subjects people could investigate, discuss and deny. The Framers knew, better perhaps than we do today, the risks they were taking. They knew that free speech might be the friend of change and revolution. But they also knew that it is

always the deadliest enemy of tyranny. With this knowledge they still believed that the ultimate happiness and security of a nation lies in its ability to explore, to change, to grow and ceaselessly to adapt itself to new knowledge born of inquiry free from any kind of governmental control over the mind and spirit of man. Loyalty comes from love of a good government, not fear of a bad one.[134]

[134]Black, *The Bill of Rights*, 35 N.Y.U.L. REV. 880-81 (1960).

Comment

Aunt Minnie's Portrait

By John S. Grimes, A Male Chauvinist*

We never speak
of Aunt Minnie
Her picture is
turned to the wall.[1]

After the angels took dear Mama, that scheming woman got her claws into poor Papa. Now that Papa is gone that stepmother of mine wants all of what little of Papa's property she didn't make him spend on her while he was alive.

She even wants Aunt Minnie's portrait. She calls it a cute little antique. After Aunt Minnie ran off with that travelling man, Grandma turned her picture to the wall. But I always liked Aunt Minnie. Besides, it has a real good frame.

When Papa went to the hospital the last time I fixed her little red wagon real good. Jake, that's my husband, read a book about how to keep from paying money to lawyers. So he wrote up a will and I got Papa to sign it leaving to me what little of his property she hadn't spent. And I had him transfer his checking account at the bank to him and me jointly. His savings pass book he changed to him, as trustee for little Alfred, that's my boy.

He had some buildings and loan shares that read P.O.D. to my stepmother. I fixed the will so that they went to me. The will also gives me his life insurance money that she had him make her the beneficiary. He had some savings and loan money that she made him put in joint names, but that goes to me under the will.

Most of the furniture came from Grandma and is mine by rights. She made him buy some modern stuff, though.

His "E" bonds and his Water Company stock she had him buy in joint names. He even put the house and the farm in joint names. I changed all that in the will.

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*Characterization provided by the author, who is Professor of Jurisprudence, Indiana University School of Law—Indianapolis. J.D., Indiana University, 1931.

[1]Remainder of couplet expurgated as not suitable for a serious law review. The turning of the portrait to the wall was not limited to the errant female. When General Thomas stayed with the Union and refused to follow Lee into the Confederate ranks, his two maiden sisters in Richmond, Virginia, literally turned his portrait to the wall.

The will gives me Papa's company pension rights that she had him make her the beneficiary.

She claims some of the money that went to buy the farm came from her first husband. That guy never left her nothing but some empty bottles.

When Papa sold the farm on contract two years ago she didn't sign. Papa has been putting the payments into the savings account that goes to me under the will.

Now she has hired some cheap shyster who says it all goes to her. That lawyer says smart alect law professors, and you know what I think of them, says the legislature gives the money to her. Some stupid legislature! That's why I never vote.

There is some money she won't get her hands on. You can bet as soon as Papa died, I went to the bank and got that P.O.D. money. She won't get that.

She's not getting much on the house because Papa had a big mortgage on it before he transferred it to joint names.

She claims she worked and built the lake cottage on Papa's lot. She never worked nobody but poor Papa.

Jake, that's my husband, says he will swear on a stack of Bibles that Papa told him before Papa married that woman, if he did, which I don't believe, they wrote an agreement that she would not claim anything of Papa's property when he died. But you can bet she has hidden that.

She even won't give me Mama's wedding ring. That, she says, Papa let her have when they were married. I don't think they ever were.

Crafty Jake has opened up Pandora's box of surviving spouses' rights and of cotenancies in Indiana. Both have travelled thorn-strewn paths since 1816. Unfortunately, the courts and legislatures have gone far to justify the daughter's opinion of them.

Papa's property is considered in five estates: (a) Federal estate and gift taxes, (b) Indiana inheritance (now death) taxes, (c) property subject to creditors' claims, (d) the assets belonging to the bereaved spouse, and (e) the residue, which will go to the anxious heirs and legatees.

The death grip of the federal revenue[2] fastens itself on all of Papa's property, including life insurance held in his name at the time of his death or transferred to another within three years prior to death, to the extent that the other person cannot establish a contribution thereto. This, sadly, applies even to property held in two or more names at time of death. Such inter vivos transfers, whether

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[2]*See, e.g.*, I.R.C. §§ 2035, 2040, 2042, 2515.

or not in joint names, are also subject to gift taxes, except in the case of tenancy by entireties realty. While the community property differential has been eased by the federal marital deduction bounty, this does not alter the common law concept that the wife is still a mere luxury as regards her husband's earnings.

If, by chance, Papa's net estate is in excess of the credit provided by 26 U.S.C. § 2052, and subject to Indiana estate tax, the advantage of the cruel witch becomes a problem in the new mathematics. Although the transfer of the house into an entireties was not subject to gift tax under 26 U.S.C. §§ 2501, 2515, and 2523, this statement is not applicable to the personalty, tangible or intangible. And, of course, if the gifts to the second spouse were made within the time of 26 U.S.C. § 2035(b), they are subject to federal estate tax; if they were made earlier, they are subject to gift taxes as well as to the Indiana apportionment statute and death taxes.[3]

The Indiana General Assembly has not been as tax avaricious as the federal government. The house, which is entireties property, escapes Indiana death taxes, of course.[4] Whether the proceeds from the sale of the entireties property is taxable cannot be determined under the facts given to us by stepdaughter, Cinderella. So much of the estate as consists of "non-probate" assets is, likewise, exempt under Indiana Code chapter 32-4-1.5.[5] So if the proceeds of entireties property are transferred to a joint bank account they are not subject to Indiana death taxes, but if invested in other types of intangibles, these proceeds may still be taxable on death.[6] If the entireties property were sold on contract, the remaining unpaid portion of the purchase price would still be entireties.[7]

The claims of the cruel stepmother, the fourth estate, have been the subject of a changing pattern throughout the centuries of the common law, and Jake's approach forces us to a review of the entire historical pattern of marital rights.

Certain anthropologists maintain that when genus homo first came down from his arboreal habitat, the early species homo robustus died out because the thickening of the thighs resulting from use of the leg muscles prevented the female robustus from giving easy birth to a normal-headed child. Homo sapiens survived because the head of the child at birth was small, subject to future growth. This in turn limited the activities of the baby and required the

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[3]IND. CODE §§ 29-2-12-1 to -7, 6-4.1-2-1 to -7, 6-4.1-5-1, 6-4.1-11-1 to -6 (Burns Supp. 1976).

[4]*See id.* § 6-4.1-3-7.

[5]*Id.* §§ 32-4-1.5-1 to -15 provide that transfers of such assets are not testamentary.

[6]*See, e.g.*, IND. CODE §§ 6-4.1-1-5, 6-4.1-2-2(3) (Burns Supp. 1976).

[7]*Id.* § 32-4-3-1 (Burns 1973).

attention of the mother for long years until the child reached self-sufficient age. From this it followed that the male was required to protect the female during immaturity of the child for a much greater period of time than is normal among other animals. Hence, the female, of necessity, degenerated into a status inferior to the male. In the medieval period this, of course, was augmented by the military characteristics required in feudalism and consequently the status of the male was maintained at a level above that of the female.

At this point we find a peculiar contrast.

Tacitus speaks of the contempt the "noble Roman" held for the Germans with whom he was in touch, because the latter held females in high esteem. We presume that he was speaking of the Suebi, who, when they migrated to Spain, contaminated the ultimately dominant Visigoth with this heresy. Hence, rooted in Spanish law is the concept of the double yoke: the husband and wife pulling as a team and each contributing an equal amount to the family estate. This infection crept into Mexico and thence into the Mexican-dominated territories of what is now the United States, and is responsible for the false doctrine known as "community property."

In 1943, along with a number of other states attracted by the income tax break given community property estates, Indiana almost adopted the community property concept. It was saved from this fate only by the courageous action of its Attorney General, who declared the concept unconstitutional. Of course, common law states which fell into this trap subsequently repealed their statutes when the marital deduction became a part of federal income tax law.

Archaeological evidence would indicate that the Mesopotamian, and perhaps other early cultures, solved the problem of the widow by burying her alive at her husband's funeral ceremonies. Or, perhaps, the stepdaughter would prefer the Hindu custom, surviving until the 1850's, of burning the stepmother on her husband's funeral pyre.

Neither the civil nor the common law took these approaches.

The wife in England lost all personal property on her marriage except as might be saved to her by the scheme of the Use and, after the sixteenth century, by the Trust. But, by gradual development from the Anglo-Saxon right to "set by the fire" for the balance of her days, the widow acquired the right to require the heirs to set off to her a one-third interest in all her husband's realty held by him in a fee simple absolute at any time during his lifetime for her own life with reversion to his heirs. This was not in recognition of her efforts as a housewife, but rather for the benefit of the rate payers, to keep her off the streets.

Beginning in 1852, Indiana yielded to the demands of the women suffragettes and eased off from the common law precepts. The 1852 legislature, recognizing the perils arising from the avaricious

childless stepmother, provided her only a one-third life estate in her husband's property. But in 1881 the supreme court reversed several earlier decisions and gave her the interest in fee, with the children by the first marriage reduced to her forced heirs. The 1889 legislature attempted to restore her life estate in the deceased husband's realty, but the act was unconstitutional.

In 1901 another enactment restored the original one-third for life as an inchoate interest, and in 1947 this interest was extended to the second childless husband. Statutes were expanded by judicial decision to give the wife a fee interest instead of a life estate if the husband's property was divested by judicial sale. If, however, the relic remarried, her interest died during such coverture and became either a defeasible fee upon her death with a shifting use to children by the first marriage or such children became her forced heirs.

These acts, except as applied to the second childless spouse, were all repealed by enactment of the Probate Code in 1954. But if, as purported by the Probate Code Commission, the Code merely reenacted the old law, we have the question of whether the pre-1954 statutes were revived and the possibility that, regardless of any election under the will, the stepmother has a one-third interest in fee in the farm, dating back to possibly the date of the contract and, consequently, to a one-third interest in all monies paid thereunder. This is further complicated by the question of whether the 1971 repeal of Indiana Code section 29-1-2-3[8] operated retroactively, so that if the interests of the widow did not vest immediately upon the execution of the contract of sale, the husband could sell the property and so defeat the one-third given to the wife under section 29-1-2-1. If sections 29-1-2-1 to -3 did, as suggested, merely give an inchoate interest to the wife, then, of course, such could be erased by the repeal of section 29-1-2-3. If, however, the interests of the wife had vested on the date of the execution of the contract, repeal of section 29-1-2-1 could not take away a property right.

At all events, despite Indiana legislative and judicial history which reveals a slow erosion of the concept that "papa is all," it is clear that Indiana contemplates that whenever property is taken in the name of the husband and wife a gift has resulted to the wife unless she contributed to the acquisition by her separate income or estate. Thus, Jake's program, both as to the will and to the inter vivos transfers, encounters much legal difficulty, since Indiana's legislature and courts have largely thwarted his valiant efforts. Despite

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[8]Former Indiana Code sections 29-1-2-1, -1-2-2 and -1-2-3 authorized the wife's interest, which could not be defeated unless the husband, complying with section 29-1-2-3, obtained a written waiver.

shameful retreats, Indiana has not wholly departed from the common law position that the married woman performs in her household duties no useful task. She is entitled only to such food, clothing, and shelter as her lord and master sees fit to give her. Her efforts as a homemaker do not contribute to any augmentation of the family fortune; she is deemed a contributor only to the extent that she adds a separate property or earnings from outside work to the family income. Fearlessly, it is suggested that the repeal of section 29-1-2-1 reduced the other spouse to the status of a mere designated heir, protected only by Indiana Code section 29-1-2-2 as to creditors[9] and section 29-1-3-2[10] as to wills, and that this applies retroactively.

If Papa did "get wise" to his wife and transferred property during his lifetime to his darling daughter, *Crawfordsville Trust Co. v. Ramsey*[11] will also rear its head. It is apparent that, with or without the daughter's able assistance, the commingling of the joint affairs of the husband and wife presents innumerable complications.

Indiana Code section 29-1-4-1,[12] effective January 1, 1976, gives the spouse, if surviving, and if no spouse any dependent children, a "claim" against the decedent's estate in a lump sum of $8,500. It is paid primarily out of personalty, with any deficit coming out of and being a lien upon realty. The Uniform Probate Code spoke of "children," but Indiana Code section 29-1-4-1 changed this to "dependent children." (Whether this refers to those under 18, those over 18 but incompetent, and those over 18 but financially dependent, such as students, must be later determined by the courts.)

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[9]IND. CODE § 29-1-2-2 (Burns 1972) protects the widow's interest against the demands of creditors as to one-third of realty valued to $10,000, one-fourth of real property valued to $20,000, and one-fifth of such property valued in excess of $20,000.

[10]This statute provides that if litigation is pending which may affect the surviving spouse's share, an election is not barred until 30 days after a final determination of the issues.

[11]55 Ind. App. 40, 100 N.E. 1049 (1913). This case established, *inter alia*, that conveyances of real estate made by the husband during coverture in order to defeat the wife's rights are, as to her, fraudulent and void.

[12]IND. CODE § 29-1-4-1 (Burns Supp. 1976) provides:

> The surviving spouse of a decedent who was domiciled in Indiana at his death is entitled from the estate to an allowance of eight thousand five hundred dollars [$8,500] in personal property. If there is no surviving spouse, the dependent children of the decedent are entitled, per stirpes, to the same allowance to be divided equally among them. If there is less than eight thousand five hundred dollars [$8,500] in personal property in the estate, the spouse or dependent children, as the case may be, are entitled to any real estate of the estate to the extent necessary to make up the difference between the value of the personal property and eight thousand five hundred dollars [$8,500]. The amount of that difference is a lien on the real estate. An allowance under this section is not chargeable against the distributive shares of either the surviving spouse or the children.

This allowance is not chargeable against the distributive share of the spouse or children. Presumably children share equally, if at all. Whether as a claim it must be filed under section 29-1-14-1 is not clear.[13] It is believed, however, that the answer is in the negative. Although the allowance is payable primarily out of personalty, it is believed that any resulting abatement would be apportioned by contribution from realty in the case of specific bequests and devises.

Another unsolved problem is whether, if the spouse is "unworthy" she would take under Indiana Code section 29-1-4-1, as she did under the former statute.[14] Again, the answer is believed to be in the negative.

The 1976 General Assembly did not amend Indiana Code section 29-1-3-7, referring to "homestead, widows or family allowance."[15] It is presumed, however, that the present provisions of section 29-1-4-1 are a substitute. It will be noted that Indiana Code section 29-1-3-7, considered with section 29-1-3-1,[16] may have changed the former law,

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[13]IND. CODE § 29-1-14-1(a) (Burns Supp. 1976) provides:

> All claims against a decedent's estate, other than expenses of administration and claims of the United States, and of the state and any subdivision thereof, whether due or to become due, absolute or contingent, liquidated or unliquidated, founded on contract or otherwise, shall be forever barred against the estate, the personal representative, the heirs, devisees and legatees of the decedent, unless filed with the court in which such estate is being administered within five (5) months after the date of the first published notice to creditors.

[14]*See In re* Mertes' Estate, 181 Ind. 478, 104 N.E. 753 (1914), holding that a wife convicted of killing her husband cannot be denied her statutory allowance.

[15]IND. CODE § 29-1-3-7 (Burns 1972) provides:

> When a surviving spouse makes no election to take against the will, he shall receive the benefit of all provisions in his favor in the will, if any, and shall share as heir, in accordance with the provisions of . . . [sections 29-1-2-1 and 29-1-2-2] in any estate undisposed of by the will. The surviving spouse shall not be entitled to take any share against the will by virtue of the fact that the testator made no provisions for him therein, except as he shall elect pursuant to this [Probate] Code. By taking under the will or consenting thereto, he shall not thereby waive the rights of homestead, or to a widow's or family allowance, unless it clearly appears from the will that the provision therein made for him was intended to be in lieu of such rights.

[16]IND CODE § 29-1-3-1 (Burns 1972) provides:

> When a married person dies testate as to any part of his estate, the surviving spouse shall have a right of election to take against the will under the limitations and conditions hereinafter stated.
>
> (a) The surviving spouse, upon election to take against the will, shall be entitled to one-third [1/3] of the net personal and real estate of the testator; provided, that if the surviving spouse be a second or other subsequent spouse who did not at any time have children by the decedent and the decedent left surviving him a child or children or the descendants of a child or children by a previous spouse, such surviving second or subsequent

which did not require the spouse to formally elect against the will if the instrument left her nothing. Now, apparently, election is required in all events, even if the will purports to devise entireties property. This places stepmother in a dilemma. Under section 29-1-3-7 she may take the survivor's allowance provided by section 29-1-4-1 if she does not elect against the will. But if she does elect against the will, section 29-1-3-1(c), which is not yet interpreted, may deprive her of that interest. The matter would be of particular importance if the estate is insolvent.

It is submitted that since section 29-1-4-1 probably makes the spouse's allowance a "claim,"[17] section 29-1-3-1(c) is no longer effective, and stepmother would not be forced to an election to take assets in which she had a property right prior to Papa's death.

Let us now speak, somewhat timidly, of Aunt Minnie's portrait and Mama's wedding ring.

Effective January 1, 1977, under section 32-4-1.5-15, household goods acquired during coverture and in the possession of both spouses "become the sole property" of the surviving spouse unless a clear contrary intention is expressed in a written instrument. Does this create a present inter vivos interest in household goods though one spouse provides all the funds? Or, does the contribution factor

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childless spouse shall upon such election take one-third [1/3] of the net personal estate of the testator plus a life estate in one-third [1/3] of the lands of the testator.

In determining the net estate of a deceased spouse for the purpose of computing the amount due the surviving spouse electing to take against the will, the court shall consider only such property as would have passed under the laws of descent and distribution.

(b) When the value of the property given the surviving spouse under the will is less than the amount he would receive by electing to take against the will, such surviving spouse may elect to retain any or all specific bequests or devises given him in the will at their fair market value as of the time of such election and receive the balance due him in cash or property.

(c) In electing to take against the will, the surviving spouse is deemed to renounce all rights and interest of every kind and character in the personal and real property of the deceased spouse, and to accept such elected award in lieu thereof.

(d) When a surviving spouse elects to take against the will, he shall be deemed to take by descent, as a modifixed [modified] share, such part of the net estate as does not come to him by the terms of the will. Where by virtue of an election pursuant to this article [29-1-3-1—29-1-3-8] it is determined that such spouse has renounced his rights in any devise, either in trust or otherwise, the will shall be construed with respect to the property so devised to him as if such surviving spouse had predeceased the testator.

[17]While section 29-1-4-1, which authorizes payment of the allowance, does not expressly call the obligation a "claim," section 29-1-14-9, which lists the priority of "claims," includes the survivor's allowance.

enter in, as it does in joint tenancies? Does this create a tenancy by the entireties with consequent immunity from creditors inter vivos or post-mortem? The last clause of section 15 exonerates household goods from state death taxes, but not federal gift or estate taxes. We have not yet learned whether this section can be defeated by the will of the contributing spouse. In this case, while the portrait might be considered "household goods," it was not acquired during coverture; therefore section 32-4-1.5-15 does not apply.

After January 1, 1976, a judge must spend the midnight oil determining whether Indiana Code section 29-1-4-1 makes the $8,500 allowance a charge on individual items of personalty, or whether he has the authority to shift a part of the lien on to realty. It is feared that in this hypothetical, unless the personalty exceeds the $8,500, Cinderella will not triumph. Stepmother could include the portrait and the frame, together with the ring, in her $8,500 allowance.

But would she be wise in so doing? She is entitled to the full ownership of personalty under Indiana Code section 29-1-4-1, but she has only a life estate in one-third of realty under section 29-1-2-1. If the value of the personalty is less than $8,500 (and how do we now determine this, since former Indiana Code section 29-1-12-4, the appraisal statute, was repealed effective January 1, 1976?) how does this affect her real estate? If the deficit is a lien, presumably we are faced with a forced sale of the realty. Then out of the proceeds of the sale we take costs of sale and costs of administration. Then appears the funeral director. Does he stand behind stepmother under Indiana Code sections 29-1-4-1 and 29-1-14-9?[18] There is a further enigma: are the "children" who are in the third priority intended to be the alternative beneficiaries under section 29-1-4-1 or does "children" refer to all heirs under section 29-1-2-1? Presumably the former. Does all this mean that in distributing the proceeds of the sale, stepmother gets the deficit after the debts and the funeral director are satisfied, and then the net is distributed by giving her the value of her life estate in one-third according to the mortality tables? Or, does it mean that stepmother's one-third is of the gross realty before the deduction?

We may dismiss the efforts of the testator to affect stepmother's taking by way of a third party beneficiary in the life insurance or the pension plan. Each can be affected only by inter vivos action of the deceased as an insured or a retired employee. "That woman's" interest in the E bonds could have been altered only by mutual

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[18]IND. CODE § 29-1-14-9 (Burns Supp. 1976) classifies claims and directs the personal representative to pay them in the following order: administration, funeral expenses, allowance to the surviving spouse or dependent children, federal taxes, medical expenses of the last sickness, state taxes, other claims.

consent of the spouses. A testamentary instrument can affect only assets of the testator and cannot diminish rights of others, such as third party beneficiaries in life insurance policies or the property rights of survivors in cotenancies.

The P.O.D. situation is not so clear. No case has been found which has determined that a Pay on Death provision creates a property right inter vivos in the payee and such a right is not contemplated by Indiana Code chapter 32-4-1.5. It is also uncertain whether, excepting federal securities, P.O.D. language prior to January 1, 1976 was testamentary and hence void as an invalid bequest.

Jake's concern about personal property held in dual names includes three situations: (1) federal securities, (2) other intangibles, and (3) "non-probate assets" under the 1975 Act.

Treasury regulations provide that in the case of federal securities the surviving cotenant or P.O.D. payee takes the whole. The courts have disagreed about whether this regulation operates as a rule of property, or if it is merely a federal rule of accounting convenience. It is believed that in the case of federal E and H bonds the federal regulations prevail as to the right of possession, as well as to the passage of title on death, as a valid non-testamentary instrument. As to other federal securities, however, the regulations relate only to passing on death. Inter vivos it is believed that the securities are not held by the entireties, so that ownership can be severed inter vivos by action of either party or involuntarily.

The federal regulations on passage at death do not tell us whether the property is a joint tenancy, a tenancy in common with right of survivorship, or life estates with cross remainders. It is doubted that a tenancy by the entireties arises in the case of husband and wife. It is believed that the protection against creditors given by the concept of a tenancy by the entireties is of such unique character that a tenancy in entireties cannot be created in personalty other than the fruits or proceeds or realty so held, despite all attempts of the parties.

The 1976 General Assembly adopted Indiana Code chapter 32-4-1.5, the "Non-Probate Transfer" concept of the Uniform Probate Code, after rejecting it in 1975. Effective January 1, 1977, this statute is part of the periodic adoption of parts of the U.P.C., undertaken on the principle that it is less painful to amputate a limb an inch at a time.

The "Non-Probate Transfer" is an attempt to be helpful in three cloudy areas: the Totten Trust, the P.O.D., and the cotenancy in certain intangible property, by clarifying and to some extent unifying relationships between parties holding together interests in accounts.

The "remedial" provisions are unfortunately limited to accounts in Indiana "financial institutions." They do not deal with securities

issued by these institutions except "certificates of deposit" and "share accounts." Presumably, this phraseology applies to all short term paper, whatever its particular designation, but not to long term debentures or equity stocks, and there is a gray area of mutual funds which is not believed to be embraced.

One of the major difficulties of uniform laws is that they are not uniform. The draftsmen are inclined to use phraseology to which they are accustomed in their own jurisdiction, under the principle that "any fool knows that." However, language incorporated in the uniform code may be adopted in a state which has placed judicial construction on the language entirely different from that of the state of the draftsmen. Here, unless the official comments of the framers of the uniform code have pointed out the proper interpretation, the lawyer in the adopting state is placed in the dilemma of following the principle that where a statute is adopted from another state the decisions under the law of that state are available for construction but are not binding, as against the rule that the local law is not considered changed by statute unless the phraseology to that effect is clear.

This is happening in the U.P.C. Since legislatures adopting the Code in whole or in part are, as Indiana is doing, making substantial changes in the "uniform" phraseology, the greatest care must be taken in interpreting Indiana law by application of the U.P.C. Commission Comments or decisions from other states which have purportedly adopted the Code.

When the Indiana legislature adopted Indiana Code chapter 32-4-1.5, the repeal of chapter 32-4-1 was ignored. Hence, we had in Indiana no applicable statute as to cotenancies in personalty between January 1, 1976 and January 1, 1977 as to the above-mentioned three joint tenancies. We now have seven applicable periods governing personalty: (a) joint tenancy as to rights arising before 1852, the effective date of Indiana Code chapter 32-4-1 prior to amendment, (b) Indiana Code chapter 32-4-1 after 1852 and before the 1949 amendment, (c) Indiana Code chapter 32-4-1, as amended, between 1949 and 1971, (d) between 1971 and 1976, (e) common law joint tenancy between January 1, 1976 and January 1, 1977, (f) Indiana Code section 32-4-1.5-15[19] after January 1, 1977 (except

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[19]IND. CODE § 32-4-1.5-15 (Burns Supp. 1976) provides:

Personal property, other than an account, which is owned by two [2] or more persons is owned by them as tenants in common unless expressed otherwise in an instrument or written agreement. However, household goods acquired during coverture and in possession of both husband and wife shall upon the death of either become the sole property of the surviving spouse unless a clear contrary intention is expressed in a written instrument;

possibly as to building and loan or savings and loan certificates and trusteeships), and (g) the period after the amendment to Indiana Code section 34-4-1.5-15 adopted by the 1977 General Assembly.

No mention of federal securities is made in Indiana Code section 32-4-1.5-15. While this is the subject of litigation, it is believed the Indiana courts will pay tribute to the federal regulations despite the sweeping phraseology of the statute.

The Indiana Supreme Court's recognition of the Totten Trust, the bank account with little Jimmy as beneficiary, and its interpretation of section 32-4-1.5-1(5)[20] brought to Indiana a maze of problems from other jurisdictions which had recognized such a trust. Until the adoption of Indiana Code chapter 32-4-1.5, it is believed that P.O.D. provisions had no effect in Indiana except to protect a bank paying out under such a provision or in the case of copartnership and, possibly, federal bonds. Likewise, "and," "or" and "and/or" had only such limited operation. In all other situations, unless there were clear words of survivorship, two persons as cotenants held as tenants in common as to personalty, except between January 1, 1976 and January 1, 1977, when they held as joint tenants unless otherwise provided. Under the amendment of 1977, a cotenancy between husband and wife is not clearly defined.

Indiana Code section 32-4-1.5-3 indicates that a joint account belongs during the lifetime of all parties to the parties in proportion

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provided, however, that this shall not create a presumption that the exercise of the right of the surviving spouse to the immediate ownership or possession in enjoyment of such property shall be deemed a transfer taxable under the provisions of [Indiana Code sections 6-4-1-1 to 6-4-1-40].

The 1977 General Assembly amended the section to read as follows:

Personal property, other than an account, which is owned by two (2) or more persons is owned by them as tenants in common unless expressed otherwise in an instrument or written agreement. However, household goods acquired during coverture and in possession of both husband and wife, and any promissory note, bond, certificate of title to a motor vehicle, certificate of deposit, or any other written or printed instrument evidencing an interest in tangible or intangible personal property in the name of both husband and wife, shall upon the death of either become the sole property of the surviving spouse unless a clear contrary intention is expressed in a written instrument.

[20] IND. CODE § 32-4-1.5-1(5) (Burns Supp. 1976) defines a multiple party account as:

"Multiple-party account" is any of the following types of account:

(i) a joint account;

(ii) a P.O.D. account; or

(iii) a trust account.

It does not include accounts established for deposit of funds of a partnership, joint venture, or other association for business purposes, or accounts controlled by one [1] or more persons as the duly authorized agent or trustee for a corporation, unincorporated association, charitable or civic organization or a regular fiduciary or trust account where the relationship is established other than by deposit agreement;

to their contributions thereto, unless there is clear and convincing evidence of different intent. A P.O.D. account belongs to the original payee during his lifetime and not the payee and payees. If more than one person is named as original payee during their lifetimes the rights between them are governed by that of a joint account.

The trust account belongs beneficially to the trustee during his lifetime, or if there are two or more parties as trustee, rights between them are governed by their net contribution. However, if there is an irrevocable trust the account belongs beneficially to the named beneficiary.

Upon death of a party to a joint account,[21] the amount remaining on deposit belongs to the surviving party as against the estate of the decedent, absent clear and convincing evidence of a different intention at the time the account was created. If there is more than one surviving party, then ownership during their lifetimes is in proportion to their previous ownerships augmented by an equal share for each survivor of any interest that the decedent had in the account at the time of his death, but the right of survivorship continues between the survivors.

If it is a P.O.D. account, when the original payee or the survivor of two or more original payees dies, any sums remaining on deposit belong to the P.O.D. payee or payees if surviving, or to the survivor of one of them if one dies before the primary payee of the P.O.D. account. But, if there are two or more payees surviving, there is no right of survivorship as among the payees thereafter, unless the terms of the deposit specifically provide for survivorship.

If the account is a trust account, on the death of the trustee or the survivor of two or more trustees, any sums remaining on deposit belong to the person or persons named as beneficiaries, if they are surviving, or to the survivor if there is more than one and one dies before the trustee, again unless there is clear and convincing evidence to the contrary. If two or more beneficiaries survive, there is no right of survivorship on the death of one of them thereafter unless the terms of the account so require.

The death of any party to a multi-party account, other than specified above, has no effect on beneficial ownership of the account other than to transfer the rights of the decedent as part of his estate, unless, possibly, the parties are husband and wife under the 1977 amendment to Indiana Code section 32-4-1.5-15.

Survivorship provisions are determined by the form of the account as of the death of a party.[22] After an account has once been opened it can be altered by written order given by a party to the

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[21] IND. CODE § 32-4-1.5-4 (Burns Supp. 1976).

[22] *Id.* § 32-4-1.5-5.

financial institution to change the form of the account or to stop for failure of payments under the terms of the account, but it must be signed by the party, received by the financial institution during his lifetime, and not countermanded by other written order of the same party during his lifetime. This should bar wills bequeathing P.O.D. or Totten Trusts to other than the payee or beneficiary. Valid gifts causa mortis, however, would be effective.

Transfers resulting from the survivorship provisions are effective by reason of the accounts themselves and the statute, and are not considered testamentary or subject to the provisions of the Indiana Code.

There is, however, a major exception to this rule under section 32-4-1.5-7, because a multi-party account cannot transfer to the survivor sums needed to pay claims, taxes, and expenses of administration, including the statutory allowance to the surviving spouse or dependent children, if the other assets of the estate are insufficient.

If the beneficiary or surviving party receives payment from a multi-party account after the death of the deceased, he must account to the personal representative of the deceased for amounts that the decedent owned beneficially immediately prior to his death to the extent necessary to discharge the above stated claims, if unpaid, after the whole of the decedent's estate has been applied thereto, excepting the $8,500 allowance. Proceedings to assert this liability are commenced only upon demand of a surviving spouse, a creditor, or one acting for a dependent child of the decedent, and must be commenced not later than one year following the death of the decedent. Sums so recovered are administered as part of the decedent's estate. This does not effect the right of a financial institution to make payment according to the terms of the multi-party account or make the institution liable to the estate of the deceased party, unless before payment the institution has been served with process in a proceeding by the personal representative. Any sums in a joint account may be paid by the financial institution on request to any party, regardless of whether the other party is incapacitated or deceased at the time the payment is made. But payment cannot be made to the personal representatives or heirs of a deceased party, unless proof of death is presented to the financial institution showing that the decedent was the last surviving party or unless there is no right of survivorship.[23]

The statute does not answer all questions about the nature of a joint account. It is presumed that even though the statute contemplates that even in the case of insolvency of the deceased the property becomes part of his estate, this does not affect the ability of the

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[23]*Id.* § 32-4-1.5-9.

depositors by contract to create a true joint tenancy with survivorship or tenancy in common with contractual right of survivorship in the deposit which does not become part of probate assets for any purpose. It is likewise presumed that the statutory right does not create, as between husband and wife, a tenancy by the entireties in personal property.

If the account is a P.O.D., then the original party to the account may demand payment of the financial institution at any time during his life.[24] Payments may be made to the personal representatives or heirs of a deceased original payee, if proof of death is presented to the financial institution showing that he was a survivor of all other persons named in the account either as an original payee or the P.O.D. payee. Totten Trust accounts may be paid on request to any trustee.[25] If the financial institution has not received written notice that the beneficiary has a vested interest, not dependent upon his surviving a trustee, the payment may be made to the personal representative or heirs of a deceased trustee upon proper proof of death presented at the institution showing that the decedent was the last survivor of all the persons named in the account either as trustee or beneficiary. Payments may be made to the beneficiary upon showing of proof of death and that the beneficiary or beneficiaries survived all persons as trustees.

The financial institution is protected on making payment regardless of whether payment is consistent with the beneficial ownership of the account if between the parties, P.O.D. payees, or beneficiaries of their successors.[26] It is not protected if after it has received written notice from any party able to request present payment to the effect that withdrawals should not be permitted. If such notice is given, and not withdrawn, the successor of any deceased party must concur in any demand for withdrawal if the financial institution is to be protected. No other notice or other information shown to be available to the financial institution affects its right to this protection, but the protection has no bearing on the rights of the parties in disputes between themselves or their successors regarding the beneficial ownership of funds in the multi-party accounts. Without regard to qualification of other statutory rights of setoff or liens, and subject to any contractual provision, the financial institution has the right of setoff against the account in which the party had immediately before his death a present right of withdrawal.[27] The amount of the account subject to setoff is that portion in which the debtor is or was

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[24] *Id.* § 32-4-1.5-10.
[25] *Id.* § 32-4-1.5-11.
[26] *Id.* § 32-4-1.5-12.
[27] *Id.* § 32-4-1.5-13.

immediately before his death beneficially entitled and, in absence of proof of net contributions, to an equal share, with all parties having a right of withdrawal. The Act of 1976 also provided that provisions in insurance policies, contracts of employment, bonds, mortgages, promissory notes, deposit agreements, pension plans, trust agreements, conveyances, or other written instrument effective as a contract, gift, conveyance, or trust are deemed to be valid and non-testamentary.[28]

The effect is that in particular instances there may be provisions for pay on death or survivorship which would be binding in respect to heirs of an intestate decedent or beneficiaries of a will, but would still leave the property subject to claims of creditors of the estate of the deceased. The right of the owner to alter the provision would depend on whether the third party beneficiary provision is irrevocable.

Stepdaughter is in trouble, however, over the P.O.D., despite her possession of the P.O.D. proceeds. Neither Indiana Code section 32-4-1.5-12 nor section 28-1-20-1 as amended in 1976 operates to transfer title. These are merely provisions to protect the financial institution which, in good faith and prior to notice, acts on the strength of phraseology accompanying the deposit. Although the Indiana legislature has long shown tender consideration for the dilemma of a banking institution when accounts are held in joint names, regardless of the phraseology of the account, it does not appear that the financial institution may close its eyes to facts which should, in equity, require it to withhold payments to the cotenant demanding the right to withdraw.

Daughter may smile if the second marriage was not by "bell, book and candle."[29] Indiana, having abolished common law marriage, has created a gray area of what steps are necessary to create a legal marriage. This state has not recognized the Illinois *tertuim quid* of a "consensual marriage,"[30] somewhere between a common law and a legal marriage; nor has this God-fearin' state honored the mistress' rights to the extent some other jurisdictions have.

But wait. If the common law arrangement was entered into before 1958, is a marriage contract entered into before that date void?

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[28]*Id.* § 32-4-1.5-14.

[29]In view of Indiana Code section 31-1-6-1 (Burns 1973), abolishing a common law marriage effected in Indiana after January 1, 1958, the question arises as to whether the person must have been married according to strict legal procedures or whether a more compassionate view can be taken, pointing to substantial compliance with requirements for a valid marriage.

[30]Illinois has adopted a unique view, finding an intermediate status of a "consensual marriage" somewhere between a legally solemnized and a common law marriage. ILL. REV. STAT. ch. 89, § 4 (1971).

Or if the contract was entered into in a state which still approves common law marriages, would it be recognized in Indiana? An affirmative answer is suggested to the first question. A negative appears proper in the second, at least as to succession rights.

Another little unpolished gem in Indiana is the question of an attempted creation of an entireties in persons not husband and wife. Do the parties so "living in sin" take as joint tenants or tenants in common? It is believed that in view of Indiana Code section 32-1-2-7,[31] Indiana will follow what appears to be the majority rule, that there is no survivorship in such cases. Household goods and other personal property held in co-ownership by those cohabiting without benefit of clergy are held in tenancy in common unless there is a written agreement or instrument to the contrary. Presumably, such instrument or written agreement could create a joint tenancy, a tenancy in common with right of survivorship, or life estates with cross remainders.

Stepdaughter must also fear the filing of a claim for services by her father's "concubine" if cruel stepmother was not wed to Papa.

In the event a valid marriage did take place, Jake's suspicions as to the premarital agreement, if correct, may be sufficient to defang his stepmother-in-law.

Indiana has long permitted a female by an antenuptial agreement or a post-nuptial jointure to agree with her prospective or existing husband as to the extent she will take from her spouse's estate. The 1852 Act, dating from the wise days of male superiority, placed more restrictions around the agreement of the wife, intended or present, than that of the male. The Indiana Probate Code twice contemplates this situation, in sections 29-1-2-13 and 29-1-3-6, and Indiana courts have shown a tender regard for antenuptial contracts, if proven. A slightly different view has been taken of post-marital jointures, since the courts formerly took cognizance of the now passe concept of the husband's dominance of the marriage. Existing decisions must be reviewed in light of the rapidity with which this concept is vanishing.

Jake's testimony faces three obstacles: parol agreements, overreaching, and lost instrument. Both Indiana Code sections 29-1-2-13 and 29-1-3-6 specify that the agreement must be in writing and signed. Whether this is a fiat or whether, as in the case of the Statute of Frauds, the doctrine of partial compliance may be applicable, remains to be determined.

"Overreaching," particularly in the case of the mistreated wife, has been a recognized pattern of avoiding marital agreements. Three

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[31]IND. CODE § 32-1-2-7 (Burns 1973) states that conveyances of land shall be presumed to create estates in common and not joint tenancies.

factors have entered into this situation: good faith, full disclosure, and consideration. The latter two are specified in section 29-1-3-6; "good faith" is to be accepted.

If Jake cannot produce the alleged agreement, he is faced with a "lost or suppressed" instrument problem. Here arises a question of whether the proof is governed by contract or probate law. Does a marriage settlement agreement stand in the rank of a lost will? If so, stepmother's position would be that tracing the agreement into the deceased's possession would create an inference of revocation. Hopefully, the agreement was drawn by an attorney, but if the counsel represented the deceased and the helpless wife was without representation, would there not then be "overreaching"?

Daughter will be further mortified to find that stepmother can force the estate to pay off the mortgage on the house even if stepmother was personally liable on the debt secured. Even though Indiana Code section 29-1-17-9[32] changed the common law and the former Indiana rule as respects exoneration of specifically devised encumbered property, the Code did not affect the rule of exoneration of property held by the entireties on the death of one tenant.

Daughter will also be unhappy to learn that household goods passing to stepmother and personal property held in both names avoid the Indiana inheritance (now death) taxes. But justice reasserts itself, because they are subject to federal estate tax and stepmother, under Indiana Code section 29-2-12-1 must bear the amount by which their addition to the taxable estate is augmented by their value.[33]

Conclusion: The legal profession will not suffer as long as the law of marital rights remains in its present state.

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[32]IND. CODE § 29-1-17-9 (Burns 1972) provides:

> When any real or personal property subject to a mortgage, pledge or other lien is specifically devised, the devisee shall take such property so devised subject to such mortgage unless the will provides expressly or by necessary implication that such mortgage be otherwise paid. If a mortgagee receives payment on a claim based upon the obligation secured by such mortgage, the devise which was subject to such mortgage shall be charged with the reimbursement to the estate of the amount of such payment for the benefit of the distributees entitled thereto.

[33]Stepdaughter's lawyer can be grateful that Papa's death occurred before the 1977 amendment to Indiana Code chapter 32-4-1.5. This amendment, creating rights of survivorship in intangibles and automobiles held by husband and wife, does not determine whether the tenancy is merely a tenancy in common with statutory survivorship or a new tenancy by the entireties. The amendment is also unclear about how certificates of deposit are to be treated.

Note

Suggested Adjustments to Indiana Condominium and Property Tax Laws

I. Introduction

The following discussion analyzes the real property taxation of condominiums in Indiana. Such an analysis must begin with an examination of certain sections of the Horizontal Property Act (HPA)[1] and the tax laws dealing with real property assessment methods and procedures.[2] Examination of the HPA reveals that in certain respects it creates restrictions, requirements, and legal relations which are not in the best interests of the condominium unit owners and which contribute unnecessarily to the misconceptions of condominium ownership now held by the taxing authorities. Examination of the property tax laws reveals that no special statutes or regulations were enacted or promulgated in respect to assessing condominiums and townhouses as individual tax parcels; nevertheless, the assessing officials have been compelled to assess such properties. The results of these assessments indicate widespread lack of uniformity and inequality from one assessing district to the next and from one individual living unit to the next in the same project. In order to eliminate this inequality and to achieve justifiable assessments, it is necessary to reconsider some fundamentals of Indiana property tax law and amend certain statutory and regulatory provisions. The following analysis suggests that there should be a closer relationship among the property rights desired and those received by condominium homeowners and the adoption of a standard method for assessing individual living units in multi-unit buildings.

II. The Need for Greater Flexibility in the Horizontal Property Act

Occupant ownership of individual apartments on a large scale is a relatively recent phenomenon in Indiana.[3] In the last few years, the rate of growth in such ownership has been much more rapid than in the more traditional forms of housing.[4] There are two primary ways

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[1] Ind. Code §§ 32-1-6-1 to -31 (Burns 1973) [hereinafter referred to as the "HPA"].

[2] *Id.* §§ 6-1.1-1-1 to -37-13 (Burns Supp. 1976).

[3] The HPA was enacted in 1963. Prior to 1963 townhouses were known, but generally not popular.

[4] Particularly in 1972 through 1974 the rate of growth in the construction of condominiums and townhouses far exceeded the rate of growth of any other form of housing. With the drastic reduction in construction generally in the United States in 1975 and 1976, condominium and townhouse construction also decreased.

to own an "apartment" in Indiana: (1) pursuant to common law property principles, in which case the apartment is commonly referred to as a "townhouse,"[5] and (2) pursuant to the statutory provisions of the HPA, in which case the apartment is commonly referred to as a "condominium" unit.

The growth of condominium and townhouse ownership will probably continue for many years because of the advantages to both the builder/seller and the buyer. The builder/seller usually views the construction and sale of condominium and townhouse projects both as an escape from the long-term landlord problems inherent in a volatile apartment rental market and as an opportunity to earn his profit in a comparatively shorter time period.[6] The buyer will often be seeking to avoid the bother of exterior maintenance of a single-family house[7] while taking advantage of the financial benefits of home ownership, such as federal income tax deductions of mortgage interest and real property taxes[8] and increases in homeowner equity through inflation and debt amortization.[9]

While it may be impossible to distinguish a condominium from a townhouse by appearance alone, there are several important legal differences. First, while condominiums are created by the filing of a declaration and by-laws by the declarant-developer pursuant to the HPA,[10] townhouses are created by the filing of a lengthy "plat," in a

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[5]*See generally* Note, *Organizing the Townhouse in Indiana*, 40 IND. L.J. 419 (1965) [hereinafter cited as *Organizing the Townhouse*].

[6]Often the developer of an apartment project will not sell the project for a long period of time, usually at least five years, during which time the developer hopes to realize an annual cash flow. When a similar property is developed and sold as individual condominiums or townhouses the developer hopes to realize his profit in much fewer than five years.

[7]One of the strongest selling features of condominiums and townhouses is that, in most cases, the coowners' association is responsible for all exterior maintenance.

[8]I.R.C. §§ 163(a), 164(a)(1). Condominiums and townhouses are real property. *See* IND. CODE § 32-1-6-4 (Burns 1973).

[9]Most home purchases are partly financed with mortgage loans, thus permitting the buyer to invest less equity in the property than if he had paid cash. As the buyer makes mortgage payments, typically including principal payments as well as interest on the loan, his equity in the property increases. At the same time, any increase in resale value caused by inflation of building costs or neighborhood improvement will accrue to the property owner upon resale.

[10]IND. CODE § 32-1-6-2(i) (Burns 1973) provides the following definition: " 'Declaration' means the instrument by which the property is submitted to the provisions of this act, as hereinafter provided, and such declaration as from time to time it may be lawfully amended." The HPA also requires that the declaration be recorded in the office of the county recorder and contain the following particulars: land description, building description, description of common property, description and assignment of limited common property, the percentages of undivided interest for each unit, percentage of votes required to rebuild, any covenants and restrictions on use, method

manner similar to that used for creating a subdivision.[11] Thus, the HPA supplies many parameters within which the condominium declarant and coowners must operate, whereas the common law leaves the townhouse developer considerably more flexibility in determining the terms of townhouse ownership. Further, while the HPA supplies many statutory legal relations as a matter of law, the townhouse developer must be careful to create and include all necessary legal relations in the "plat."

A second major legal difference between condominiums and townhouses is the manner of ownership of the common property. In the case of condominiums, the definition of common property differs from project to project, but almost always includes the land, recreation facilities, pool, exterior walls, and roofs of the dwelling buildings.[12] In the case of townhouses, the common property usually is limited to the community building, recreation facilities, and pool.[13] Under the HPA, common property is owned directly by the coowners as tenants in common,[14] each coowner having a percentage of

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of amendment, the by-laws, other desired provisions of the declaration, and a recording reference to the building floor plans. *Id.* § 32-1-6-12. In addition, the HPA requires that detailed floor plans, certified by a registered engineer or architect, be recorded with the declaration prior to the first unit conveyance. *Id.* § 32-1-6-13.

[11]*See Organizing the Townhouse, supra* note 5, at 422.

[12]In the definitional sections the HPA provides:

> "Common areas and facilities," unless otherwise provided in the declaration or lawful amendments thereto, means and includes:
> (1) The land on which the building is located;
> (2) The foundations, columns, girders, beams, supports, main walls, roofs, halls, corridors, lobbies, stairs, stairways, fire escapes, and entrances and exits of the building;
> (3) The basements, yards, gardens, parking areas, storage spaces, swimming pools and other recreational facilities;
> (4) The premises for the lodging of janitors or persons in charge of the property;
> (5) Installations of central services such as power, light, gas, hot and cold water, heating, refrigeration, air-conditioning and incinerating;
> (6) The elevators, tank, pumps, motors, fans, compressors, ducts and in general all apparatus and installations existing for common use;
> (7) Such community and commercial facilities as may be provided for in the declaration; and
> (8) All other parts of the property necessary or convenient to its existence, maintenance and safety or normally in common use.

IND. CODE § 32-1-6-2(f) (Burns 1973).

[13]*See Organizing the Townhouse, supra* note 5, at 421, 426.

[14]In the definitional sections the HPA provides:

> "Coowner" means a person, firm, corporation, partnership, association, trust or other legal entity, or any combination thereof, who owns an apartment within the building in fee simple and an undivided interest in fee simple estate of the common areas and facilities in the percentage specified and established in the declaration.

IND. CODE § 32-1-6-2(b) (Burns 1973).

undivided interest in the common property equal to that percentage set forth in the declaration.[15] The manner of determining these percentages is left to the declarant,[16] and, once determined, may not be changed without unanimous consent of the coowners.[17] In townhouses, the common property is typically owned indirectly by the coowners as shareholders in a not-for-profit corporation which holds the legal title.[18] Each townhouse owner normally receives one share of the stock in the not-for-profit corporation, regardless of the size or value of the townhouse relative to the other townhouses in the project.[19]

A third significant legal difference between condominiums and townhouses is the extent of physical property acquired in fee simple. Under the HPA, the purchaser of a condominium unit acquires the fee simple to an "enclosed" space,[20] generally thought to be the inside of the apartment being purchased. All other property is common property and is held in common with all other coowners.[21] The townhouse purchaser generally acquires fee simple title to the apartment, including exterior walls and half of the common walls, a designated tract of land, and all physical structures located on the land.[22] The townhouse buyer, therefore, appears to acquire property rights very similar to those of the purchaser of a typical single-family residence on a platted lot.

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[15]*Id.* § 32-1-6-7(a), first sentence, provides: "Each apartment owner shall be entitled to an undivided interest in the common areas and facilities in the percentage expressed in the declaration."

[16]*Id.* § 32-1-6-7(a), second sentence, provides: "Such percentage, unless the declaration specifically otherwise provides, shall be computed by taking as a basis the value of the apartment in relation to the value of the property as a whole."

[17]"The percentage of the undivided interest of each apartment owner in the common areas and facilities as expressed in the declaration shall have a permanent character and shall not be altered without the consent of all of the coowners expressed in an amended declaration duly recorded." *Id.* § 32-1-6-7(b).

[18]*See Organizing the Townhouse*, *supra* note 5, at 426.

[19]*See, e.g.*, the enabling documentation for Chatham Walk, recorded in the Office of the Recorder of Marion County, Indiana: the Plat is recorded as Instrument No. 72-2006, and the Declaration of Covenants, Conditions and Restrictions is recorded as Instrument No. 71-6745.

[20]

> "Apartment" means an enclosed space consisting of one or more rooms occupying all or part of a floor or floors in a building of one [1] or more floors or stories regardless of whether it be designed for residence, for office, for the operation of any industry or business, or for any other type of independent use, with either a direct exit to a public street or highway or an exit to a thoroughfare or to a given common space leading to a thoroughfare.

IND. CODE § 32-1-6-2(a) (Burns 1973).

[21]*Id.* § 32-1-6-2(f).

[22]*See* note 19 *supra*.

In general, the following discussion will emphasize that the Indiana HPA is unnecessarily rigid with respect to certain provisions that require great flexibility and, consequently, is inadequate to deal with the wide variety of situations which could arise under its provisions. In focusing on the above second and third major legal differences between condominiums and townhouses, frequent comparisons will be made between the HPA and the Florida condominium laws. While there are obviously many other states with which Indiana law could be compared, Florida was selected because, first, while every state now has its own condominium enabling legislation, most have been patterned after the FHA Model Statute[23] with little significant variety. Second, Florida has experienced the most rapid and widespread growth of condominiums of any state in the nation.[24] Third, the Florida Condominium Act undergoes frequent re-examination and was substantially revised in 1976.[25] Finally, Florida seems to have solved some of the problems inherent in the Indiana HPA.

A. Uses and Abuses of the Undivided Percentage Interest

Of particular importance to condominium coowners is the fact that the percentages of undivided interest in common property are used for a variety of purposes other than simply determining the degree of ownership in the common property. There are five principal uses of the percentage of undivided interest set forth in the HPA: voting, ownership of common property, release from common liens, payment of common expenses, and ownership following termination. As will be demonstrated below, many of the non-ownership uses of the fixed percentage of undivided interest cannot be supported when compared to other means of dealing with those situations.

1. Voting

Under the HPA, the definition of that amount of votes or voters which constitutes a "majority" or "majority of the coowners" must be expressed in the total of percentages of undivided interest, rather

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[23]U.S. DEP'T OF HOUSING AND URBAN DEVELOPMENT, MODEL STATUTE FOR CREATION OF APARTMENT OWNERSHIP, Form No. 3285 (1962) [hereinafter cited as MODEL STATUTE].

[24]For example, in 1973, of 104,241 United States condominium completions, 50,688 were built in Florida and 1,108 were built in Indiana. U.S. DEP'T OF HOUSING AND URBAN DEVELOPMENT, HUD SURVEY OF UNSOLD NEW HOMES (1973).

[25]1976 Fla. Laws, ch. 76-222, § 1 (eff. Jan. 1, 1977).

than in the total number of dwelling units.[26] Thus, unless the percentages of undivided interest are equal, the larger units have a larger voice in the democratic affairs of the condominium association.

Under Florida law the definition of "majority" is simply to be inserted by the declarant in the by-laws and, in the absence of a different provision therein, each coowner is to have an equal vote, unaffected by his percentage of undivided interest.[27]

The value which may be ascribed to the more flexible Florida approach depends upon one's view of the importance of the matters upon which the coowners must vote. Some Indiana developers have viewed the matter strongly enough to fix the percentages of each unit at exactly the same amount, despite the fact that in most cases the units were not at all similar in size or market value.[28] In the final analysis, the decision should be left to the individual developers, as in Florida, rather than to the legislature.

2. Ownership of Common Property

The relative ownership interests in the common property during the life of the horizontal property regime[29] are determined by the percentages set forth in the declaration.[30] These percentages may not be adjusted for any reason without the unanimous consent of the coowners.[31] While the HPA indicates a preference for setting the percentages in the same proportion as the "values" the individual units bear to the total of such individual unit values,[32] it is also expressly provided that the declarant may use any other formula for determining the percentages.[33] Having been granted this latitude,

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[26]IND. CODE § 32-1-6-2(k) (Burns 1973) provides the following definition: " ' Majority' or 'majority of coowners' means the coowners with 51% or more of the votes in accordance with the percentages assigned in the declaration to the apartments for voting purposes."

[27]FLA. STAT. ANN. §§ 718.104(4)(i), .112(2)(b) (West Supp. 1977).

[28]*See, e.g.*, the Declaration of the Kings Cove Horizontal Property Regime, recorded in the Office of the Recorder of Marion County, Indiana, as Instrument No. 72-64856, amended by Supplemental Declaration, recorded as Instrument No. 72-68672.

[29]A "horizontal property regime" is not a legal entity; rather, it may be treated as a situation which (1) arises at the time of the recording of a conforming declaration, (2) terminates only upon the occurrence of certain events, and, (3) during its pendency, allows the real estate included in the declaration to be owned only in the manner set forth in the HPA.

[30]IND. CODE § 32-1-6-7(a) (Burns 1973), first sentence, as set forth in note 15 *supra*.

[31]*Id.* § 32-1-6-7(b), as set forth in note 17 *supra*.

[32]*Id.* § 32-1-6-7(a), second sentence, as set forth in note 16 *supra*. While the HPA uses only the word "value," it is clear from the context that "market value" is intended.

[33]*Id.* § 32-1-6-7(a), second sentence, as set forth in note 16 *supra*.

many declarants have chosen different formulae for determining the percentages, such as relative actual square feet contained in the units,[34] adjusted relative actual square feet contained in the units,[35] and equal percentages for each unit regardless of size or value.[36]

Several reasons may be advanced for not choosing the preferred relative market values of the units as the sole determinant of the percentages of undivided interest. First, the declarant will have no more than an idea of the anticipated market values of the units at the time he must record the declaration.[37] Secondly, variations in value which occur as a result of location or condition of each individual unit have little relevance to the sharing of common expenses. Thirdly, the use of market value at the time of initial sale is particularly inappropriate when the project is erected in multiple phases covering a time span of several years, because of inflation of construction costs and deterioration of older units.[38] Fourthly, the argument has been advanced that adoption of the statutory language without revision would leave a portion of the common property unallocated.[39]

The Florida Condominium Act is similar to the HPA in not limiting the declarant to one formula for the assignment of percentages of undivided interest.[40] Apparently, the Florida legislature believed that, because of the wide variety of condominium designs in Florida, no single formula would be appropriate in all cases.

3. Release from Common Liens

Shortly after passage of the original HPA,[41] the Indiana General Assembly recognized by statutory amendment the possibility that a

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[34]*See, e.g.*, the Declaration and By-Laws of The Villas of Oakbrook Horizontal Property Regime, recorded in the Office of the Recorder of Marion County, Indiana, as Instrument No. 73-32536.

[35]*See, e.g.*, the Declaration and By-Laws of Lake Forest Horizontal Property Regime, recorded in the Office of the Recorder of Marion County, Indiana, as Instrument No. 73-80839.

[36]*See, e.g.*, The Declaration of the Kings Cove Horizontal Property Regime, *supra* note 28.

[37]IND. CODE § 32-1-6-13 (Burns 1973). It is often the case that the original sales prices of the less poplar units will need adjustment.

[38]Should the project require four years from the recording of the first phase declaration to the last, and ten percent annual building cost inflation is assumed, the units in the last phase would have sales prices of over 40 percent more than those in the first phase. In addition, changes in the market may cause many models to be replaced with designs not contemplated in the original declaration; therefore, a workable price deflator would not be possible.

[39]Note, *Observations on Condominiums in Indiana: The Horizontal Property Act of 1963*, 40 IND. L.J. 57, 60 (1964).

[40]FLA. STAT. ANN. § 718.104(4)(f) (West Supp. 1977) provides that the declaration shall contain: "[t]he undivided share in the common elements appurtenant to each unit stated as percentages or fractions, which, in the aggregate, must equal the whole."

[41]1963 Ind. Acts, ch. 349, §§ 1-32, at 878.

lien could be valid against two or more coowners for obligations incurred by said coowners in proportions which were different from those found in the percentages of undivided interest. This amendment to the HPA permitted each coowner to obtain release "from the lien" on his portion of the common property "by payment of the fractional or proportional amounts attributable to each of the apartments affected."[42] This would seem to indicate a legislative recognition that it is not possible to solve all of the allocation, apportionment, or control problems which may arise in a condominium project simply by applying the percentages of undivided interest of the individual units to the total obligation.

The lien release provision in Florida is virtually identical to that now found in Indiana.[43] This represents an understanding that situations may occur involving fewer than all of the units or involving expenditures benefiting units in a manner different from their predetermined percentages of undivided interest.[44]

4. Payment of Common Expenses

To the prospective condominium buyer, perhaps the most important use of the percentage of undivided interest is to determine the buyer's share of common expenses and common profits incurred by the coowners.[45] In many cases the percentage of ownership of the common facilities in a townhouse will also be used to determine the share of common expense paid by each owner.[46] Note that while this may initially sound fair to all concerned, the declarant is left free to choose the respective percentages of undivided interest in any manner he wishes. Furthermore, regardless of the method chosen, it

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[42]IND. CODE § 32-1-6-10(b) (Burns 1973), *formerly* 1963 Ind. Acts, ch. 349, § 10, at 883. Previously the second sentence was: "Such individual payment shall be computed by references to the percentages appearing in the declaration."

[43]FLA. STAT. ANN. § 718.121 (West Supp. 1977).

[44]Any time when two or more coowners become obligated for payments under a single contract for work to be performed on their premises, for example, repainting the interiors or recarpeting each unit, the possibility arises for mechanics' liens to be filed against the coowners and their units jointly. In such event it is unreasonable to require each coowner to pay an amount on the contract equal to his relative ownership in the common property in order to obtain release from the lien; rather, the amount to be paid should bear a close relationship to the relative benefits received under the contract.

[45]IND. CODE § 32-1-6-11 (Burns 1973) provides: "Profits and expenses.—The common profits of the property shall be credited to, and the common expenses shall be charged to, the apartment owners according to the percentage of the undivided interest in the common areas and facilities."

[46]*See, e.g.*, the enabling documentation of Chatham Walk, *supra* note 19.

will probably bear little relationship to the amounts of common expense actually expended on particular units. The basic reason for this disparity is that the common expenses are incurred upon and for the benefit of the common property, not the individual units;[47] therefore, any division of a class of expenses incurred upon common property is likely to bear little direct correlation to the benefits received by members of a class which is divided upon a basis not directly related to common area. Such disparity is particularly harsh upon coowners when, on the one hand, their respective percentages of undivided interest are determined by reference to the value or size of their dwelling units, but, on the other hand, the project is designed in such a manner that a higher proportion of the common expenses accrue to the benefit of a limited number of coowners.[48] Conversely, the disparity tends to be less when the percentages of undivided interest are declared to be equal and the common expenses tend to be more for activities which benefit all coowners equally.[49]

Interestingly, Florida law has been amended to require that the percentages of undivided interest should apply also to the payment of common expenses and the ownership of common surplus.[50] In other words, although a declarant in Florida had previously been free to better match the payment of common expenses to the units receiving

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[47] "Common expenses" means and includes:
(1) All sums lawfully assessed against the apartment owners by the association of apartment owners;
(2) Expenses of administration, maintenance, repair or replacement of the common areas and facilities;
(3) Expenses agreed upon as common expenses by the association of apartment owners;
(4) Expenses declared common expenses by provisions of this act . . . , or by the declaration or the by-laws.

IND. CODE § 32-1-6-2(g) (Burns 1973).

[48] This situation will very often arise in low-rise construction where grounds upkeep will tend to benefit certain units disproportionately.

[49] The HPA followed the then prevailing trend of condominium legislation which commenced in Puerto Rico, an area which knew only high-rise construction. In high-rise buildings, of course, the problems of support, access, and utilities tend all to be common and are therefore best handled as common expenses.

[50] FLA. STAT. ANN. § 718.115(2) (West Supp. 1977), provides that: "Funds for the payment of common expenses shall be assessed [collected by assessments] against unit owners in the proportions or percentages provided in the declaration. In a residential condominium, unit owners' shares of common expenses shall be in the same proportions as their ownership interest in the common elements." *Id.* § 718.104(4)(g) provides that the declaration shall contain "the proportions or percentages of and manner of sharing common expenses and owning common surplus, which, for a residential condominium, must be the same as the undivided shares in the common expenses."

the benefits, respectively, without affecting the relative ownership structure, he is now as restricted as Indiana declarants.

Obviously, a flexible method is far superior to one which ties the common expense payment to the size or value of non-common property. So important has been the desire to properly distribute common expenses that some declarants in Indiana have chosen to disregard in whole or in part the fact that the percentages of undivided interest are used for other important purposes under the HPA.[51] If, as suggested, the declarant were allowed to provide for payment of the common expenses in any logical manner befitting the individual design of the project, he would be able to fix the percentages of undivided interest in the common property more nearly on relative values, if that method is preferred, without burdening the larger units with unjustifiably high common expenses.

5. Ownership Following Termination of the Horizontal Property Regime

There are three methods by which an Indiana horizontal property regime may be terminated: voluntary removal by consent of the coowners,[52] involuntary removal because of substantial casualty to the premises,[53] and involuntary removal through government action.[54] The HPA establishes guidelines for only the first two methods, leaving the determination of ownership rights in the third instance to the court's discretion.

a. Voluntary Removal

The HPA provides that the property may be withdrawn from the provisions of the HPA by approval of all coowners and consent of all mortgagees and other lien holders.[55] The property as a whole, including the portions formerly owned in fee simple, are then deemed

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[51]*See* the Declaration and By-Laws of Lake Forest Horizontal Property Regime, *supra* note 35. Other purposes include voting, ownership of the common property and ownership of the property upon removal or termination.

[52]IND. CODE § 32-1-6-28 (Burns 1973).

[53]*Id.* § 32-1-6-21.

[54]For example, eminent domain or removal of the property from the provisions of the HPA by judicial decree in an action to overturn the declaration.

[55]

> All of the apartment owners may remove a property from the provisions of this act . . . by an instrument to that effect, duly recorded, provided that the holders of all liens affecting any of the apartments consent thereto or agree, in either case by instruments duly recorded, that their liens be transferred to the percentage of the undivided interest of the apartment owner in the property as hereinafter provided.

IND. CODE § 32-1-6-28(a) (Burns 1973).

as owned in common. Each tenant in common would thereafter own an undivided interest in the units of all the others, such percentage to be equal to the former percentage of undivided interest in the common property.[56] Such a statutory provision could thus have the effect of creating executory interests in potentially unknown parties at an unknown future time,[57] and therefore could be in violation of the Rule Against Perpetuities.[58] Of course, any liens would be deemed to have been transferred and would attach to whatever interest the coowner then owned in the property.[59]

The section of the Florida Condominium Act setting forth the requirements for removal of the property from the provisions of the Act is similar to that of Indiana.[60] However, the declarant is not required to compel the coowners to use their original percentages of undivided interest in the common property as the only means of allocating the percentage of joint ownership after removal.[61] Liens would attach to whatever undivided shares of common property

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[56]

> Upon removal of the property from the provisions of this act, the property shall be deemed to be owned in common by the apartment owners. The undivided interest in the property owned in common which shall appertain to each apartment owner shall be the percentage of undivided interest previously owned by such owner in the common areas and facilities.

Id. § 32-1-6-28(b).

[57]Discussed in 4B R. POWELL, THE LAW OF REAL PROPERTY ¶ 633.12[3], at 814-15 (1977). Each coowner would hold an executory interest in so much of the fee simple portion of the units of the other coowners as his percentage of undivided interest sets forth; however, this interest would not be executed until the removal or termination of the horizontal property regime.

[58]IND. CODE § 32-1-4-1 (Burns 1973) renders invalid any "interest in property" unless it vests within 21 years after a life or lives in beings when the supposed interest is created and, with few exceptions, adopts "the common-law rule against perpetuities."

[59]*Id.* § 32-1-6-28(a), as set forth in note 55 *supra.*

[60]

> Unless otherwise provided in the declaration, the condominium property may be removed from the provisions of this chapter only by consent of all of the unit owners, evidenced by a recorded instrument to that effect, and upon the written consent of all of the holders of recorded liens affecting any of the condominium parcels.

FLA. STAT. ANN. § 718.117(1) (West Supp. 1977).

[61]

> Unless otherwise provided in the declaration as originally recorded or as amended pursuant to s. 718.110(5) [*Id.* § 718.110(5)], upon removal of the condominium property from the provisions of this chapter, the condominium property is owned in common by the unit owners in the same undivided shares as each owner previously owned in the common elements.

Id. § 718.117(2), first sentence.

are used in the termination.[62] Particularly interesting is the apparent legislative intent to permit the declarant to place in the declaration a provision by which fewer than all of the coowners may select voluntary removal.[63]

Clearly, the HPA requirement for ownership in common of the common property in proportion to the percentages of undivided interest is too strict. Unless it is the legislative intent to discourage voluntary removal in all cases, some flexibility should be introduced into the HPA to permit an equitable division of the property when division is desirable. A small sample of possible fact situations will suffice to demonstrate the need for such flexibility. First, where the original percentages of undivided interest are all equal, despite the fact that the dwelling units are of varying sizes and values, there is no chance that time will cause the units to become equal in market value. Thus, upon sale of the project as a whole the former owners of the larger units would receive only an equal share of the net sales proceeds, as opposed to a greater share based on relative market values of the units. Second, the counterbalancing effects of deterioration and owner maintenance operate to different extents on different units, thereby substantially reducing the predictability of future market values. One method to achieve direct correlation between the market value and percentage of undivided ownership would be to require professional appraisal of the relative market values as of the date of the removal, such values being used to determine the percentage ownership for each tenant in common upon removal, assuming that the entire property is to be owned jointly.

While the relative ownership problem might be solved by means of a mandatory appraisal, a somewhat different solution may be required to resolve potential conflicts among the coowners concerning possession of individual dwelling units following removal. Apparently, the question of who is entitled to possession of which unit upon voluntary removal has not been litigated. The general rule is that no tenant in common may exclude another tenant in common without accounting for his exclusive use;[64] however, this rule is modified by the rule that possession by one tenant in common is deemed to be possession by all.[65] The corollary to the first rule is that

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[62]*Id.*, second sentence, provides: "All liens shall be transferred to the undivided share in the condominium property attributable to the unit originally encumbered by the lien in its same priority."

[63]*Id.* § 718.117(1), as set forth in note 60 *supra.*

[64]IND. CODE § 34-1-51-1 (Burns 1973); RESTATEMENT OF RESTITUTION § 125, Comment b (1937).

[65]Because unity of possession is an attribute of tenancy in common, each tenant in common has an equal right to possession of the whole. *See* Hare v. Chisman, 230 Ind. 333, 101 N.E.2d 268 (1951); 27 I.L.E., *Tenancy in Common* 12 (West 1960); 4A POWELL, *supra* note 57, ¶ 601, at 597, and authorities cited therein.

when the possession by one cotenant of non-income-producing property does not constitute exclusion of all other cotenants from the *whole* property, there is no duty to render an accounting or pay rent.[66]

Consider, however, an example where several condominium units are rendered untenantable because of structural defects. In the event the builder could not be compelled to correct the defects, it would be natural for the original fee owner of a livable unit to desire to sever the untenantable units from his own in an effort to save exorbitant common expenses; however, in the event the coowners elected to voluntarily remove the property from the HPA, the HPA would then cause all of the property to be owned as tenants in common. Thus, only some of the coowners would be occupying livable units but potentially all of the coowners would be entitled to possession of the entire property. Thus the questions are whether, in the absence of a prior agreement among the cotenants, one cotenant may hold exclusive possession of less than the whole and whether he may do so without rendering an accounting or paying rent. In the event of litigation, the court should find that by purchasing the condominium units the coowners had consented that the terms of the former declaration represented an agreement to allow continued quiet enjoyment by the original owners of their respective units to the complete exclusion of cotenants and determine that there is no need for an accounting or payment of rent by the remaining resident coowners.

There are at least three possible modifications to the HPA which might prevent the need to litigate one's continued quiet possession after voluntary removal from the HPA. One possible solution would be to delete those provisions of the HPA which force the conversion of fee simple estates into estates in common.[67] Instead of all of the property being suddenly owned in common, the HPA could provide that those portions of the property which were owned in fee simple under the declaration could still be owned in fee simple by the same respective parties, subject to easements for support, protection, and reciprocal maintenance. To provide access and utilities to the dwelling units, the former common area and facilities could be owned in common. At the same time, the rights of the cotenants could be limited by greatly restricting the common law rights of exclusive

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[66]*See* Bowen v. Swander, 121 Ind. 164, 22 N.E. 725 (1889); Price v. Andrew, 104 Ind. App. 619, 10 N.E.2d 436 (1937); 4A POWELL, *supra* note 57, ¶ 604, at 613, and authorities cited therein.

[67]IND. CODE § 32-1-6-28 (Burns 1973).

possession[68] and partition.[69] This method may also have the advantage of not violating the Rule Against Perpetuities.[70]

A second possible solution is to leave the HPA intact but attack the problem of possession simply by adding a separate provision stating that upon removal or other termination each cotenant would be entitled to exclusive possession and quiet enjoyment of so much of the whole property as he formerly owned in fee simple or enjoyed as limited common property. This method would appear neither to escape the Rule Against Perpetuities[71] nor be sufficiently flexible to deal with many diverse fact situations, such as limited insurance recovery from casualty, discussed below. Similarly, the rights of exclusive possession and quiet enjoyment might still be subject to termination in an action for partition.[72] Lastly, there may be some small doubt whether or not a tenancy by the entirety in the fee simple unit would remain such when the fee simple is converted to tenancy in common.[73]

A third possible solution would be to require that, before an election for removal could have any binding effect, the coowners have obtained a court decree setting forth all necessary guidelines for ownership and operation of the property. Of course, the court decree may simply be a ratification of a new agreement among the coowners to accomplish the above objectives. On the other hand, the court

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[68]*See* discussion in note 65 *supra.*

[69]An action for partition is prohibited by the HPA until removal of the property from its provisions. IND. CODE § 32-1-6-7(c) (Burns 1973).

[70]*Id.* § 32-1-4-1.

[71]*Id.*

[72]*Id.* § 32-1-6-7(c).

[73]Indiana recognizes the tenancy by the entirety for ownership of real property. *Id.* § 32-4-2-1. To create and maintain a tenancy by the entirety it has traditionally been necessary to have five "unities" at the time of conveyance: marriage of the husband and wife grantees, possession, time, interest, and title. *See* 4A. POWELL, *supra* note 57, ¶¶ 615-624.1, at 663-712.4, and authorities cited therein. Once the tenancy by the entirety is created it would seem that even following removal from the HPA and conversion of all fee simple estates into estates in common, that portion of the real property which is held as tenants in common, as between the entirety and the other tenants in common, would still be held as tenants by the entirety as between the husband and wife. The reason for this non-disturbance is that upon removal or termination none of the traditional unities will have been broken by the simultaneous conveyance of the fee simple and joint interests originally held by the coowners as tenants by the entirety to each other. By analogy, joint tenancies, the legal ancestor of tenancies by the entirety, have been held to have survived involuntary conversions and attached to the newer property. Russell v. Williams, 58 Cal. 2d 487, 374 P.2d 827, 24 Cal. Rptr. 859 (1962); Fish v. Security-First Nat'l Bank, 31 Cal. 2d 378, 189 P.2d 10 (1948); Goldberg v. Goldberg, 217 Cal. App. 2d 623, 32 Cal. Rptr. 93 (1963); Zaring v. Glover, 93 Cal. App. 2d 577, 209 P.2d 642 (1958). *See also* Hewitt v. Biege, 183 Kan. 352, 327 P.2d 872 (1958).

might need to appoint a trustee with powers to operate and govern the property according to equitable principles until such time as the cotenants are able to agree upon a method of self-government or another form of dissolution. Obviously, thoughtful and creative legislation is required if an inequitable result is to be avoided.

b. Termination Following Casualty

The HPA provides that, following destruction of more than two-thirds of the building, reconstruction shall not be required and the proceeds of the insurance are to be distributed in the manner set forth in the by-laws.[74] In addition, should the coowners fail for any reason to commence reconstruction within 120 days following casualty of *any* degree, the entire property will be deemed to have been removed from the HPA. In such event the coowners would own undivided interests in the total physical property as tenants in common, the amount of such ownership to be equal to the former percentages of undivided interest in the common property.[75] At the same time, individual liens would attach to the respective interests of the tenants in common[76] and the property would become subject to being partitioned.[77] If a partition action were brought, the insurance

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[74] IND. CODE § 32-1-6-19 (Burns 1973).

[75]
> Failure to repair or rebuild—Effect.—If, within one hundred twenty [120] days of the date of the damage or destruction to all or part of the property, it is not determined by the association of apartment owners to repair, reconstruct or rebuild, then and in that event:
>
> (a) The property shall be deemed to be owned in common by the apartment owners;
>
> (b) The undivided interest in the property owned in common which shall appertain to each apartment owner shall be the percentage of undivided interest previously owned by such owner in the common areas and facilities; . . . .

Id. § 32-1-6-21.

[76] *Id.* § 32-1-6-21(c) provides that: "Any liens affecting any of the apartments shall be deemed to be transferred in accordance with the existing priorities to the percentage of the undivided interest of the apartment owner in the property as provided herein; . . . ."

[77]
> The property shall be subject to an action for partition at the suit of any apartment owner, in which event the net proceeds of sale, together with the net proceeds of the insurance on the property, if any, shall be considered as one fund and shall be divided among all the apartment owners in a percentage equal to the percentage of undivided interest owned by each owner in the property, after first paying out of the respective shares of the apartment owners, to the extent sufficient for the purpose, all liens on the undivided interest in the property owned by each apartment owner.

Id. § 32-1-6-21(d).

proceeds and the proceeds from the sale of the few remaining units would be pooled and divided according to the percentages of undivided interest.[78] Thus, there is a danger that a coowners' association could unintentionally allow the property to lose the benefits of the HPA by failing to settle a property damage insurance claim within 120 days following its occurrence.

Under the Florida Condominium Act there is a requirement that the "association" "use its best efforts to obtain and maintain adequate insurance" on the "association" and "common elements," but not otherwise.[79] The burden of maintaining, managing and operating "the condominium" is left with the association of coowners[80] and the replacement of the common elements is made a common expense.[81] Likewise, there is neither a provision with respect to the parties who should receive the insurance proceeds nor a provision for mandatory termination of the horizontal property regime upon destruction or failure to rebuild. Instead, upon substantial destruction and non-repair, any owner may sue for equitable relief, whether for termination, partition, or other relief.[82]

It is recognized that detailed insurance provisions of condominium enabling documents are among the most difficult sections to draft and administer;[83] clearly, the HPA has proven to be no exception. However, the tremendous inequity of forcing all coowners to be tenants in common at a time when only part of the common and fee simple property remains in its former tenantable condition[84]

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[78] *Id.*

[79] FLA. STAT. ANN. § 718.111(9) (West Supp. 1977).

[80] *Id.* § 718.111(1).

[81] *Id.* § 718.115(1) provides: "Common expenses include the expenses of the operation, maintenance, repair, or replacement of the common elements, costs of carrying out the powers and duties of the association, and any other expense designated as common expense by this chapter, the declaration, the documents creating the condominium, or the by-laws."

[82]

> In the event of substantial damage to or destruction of all or a substantial part of the condominium property, and if the property is not repaired, reconstructed, or rebuilt within a reasonable period of time, any unit owner may petition a court for equitable relief, which may include a termination of the condominium and a partition.

Id. § 718.118.

[83] No attempt is made herein to suggest remedies to all of the problems which might arise under the HPA, but much authority is available on the subject. *See generally* P. ROHAN & M. RESKIN, CONDOMINIUM LAW & PRACTICE (1977), and authorities cited therein; Rohan, Reskin, & Sanchirico, *Recent Developments in the Field of Insurance for Condominium Projects*, 48 ST. JOHN'S L. REV. 1084 (1974).

[84] For purposes of the following discussion it may be helpful to suppose that the project consists of many units located in several buildings on many acres of land, some of which are decimated and/or partially destroyed by very high winds.

demands further consideration of the insurance provisions of the HPA. Two arguments against a forced tenancy in common were mentioned in the section on voluntary removal,[85] namely, the significant disparity which is likely to exist between the current market value of a unit and the value of its percentage of undivided interest in the whole, and the difficulty of resolving potentially conflicting possessory interests.

When the termination is caused by a partial casualty to the premises, at least three other unique problems are caused by the HPA insurance provisions. First, it may not be a simple matter to determine whether or not the destruction constitutes two-thirds of the project,[86] in which case it may not be known if it is mandatory under the HPA to reconstruct.[87] Even if it is later determined that the project was only damaged to the extent of sixty percent, it is entirely possible that the association will not have been able to gather sufficient information with which to determine whether or not to reconstruct prior to the end of 120 days from the date of the casualty.[88] In such event, the property will be deemed to be owned in common, regardless of the wishes of the coowners.[89]

A second problem involving partial destruction can arise when it is determined that reconstruction shall not occur and the insurance settlement is being negotiated. If the property insurance policy included a "replacement cost endorsement"[90] the insurer could be

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[85]*See* text following note 67 *supra.*

[86]

> Application of insurance proceeds in case of disaster.
>
> . . . .
>
> Reconstruction shall not be compulsory where it comprises the whole or more than two thirds [2/3] of the building; in such case, and unless otherwise unanimously agreed upon by the coowners, the indemnity shall be delivered pro rata to the coowners entitled to it in accordance with provision made in the by-laws or in accordance with a decision of three fourths [3/4] of the owners if there is no by-law provision.
>
> Should it be proper to proceed with the reconstruction, the provisions for such eventuality made in the by-laws shall be observed, or in lieu thereof, the decision of three fourths [3/4] of the coowners shall prevail.

IND. CODE § 32-1-6-19 (Burns 1973).

[87]*Id.* § 32-1-6-19 provides: "Application of insurance proceeds in case of disaster.—In case of fire or any other disaster the insurance indemnity shall, except as provided in the next succeeding paragraph of this section, be applied to reconstruct the building." The balance of this section is set forth in note 86 *supra.*

[88]*Id.* § 32-1-6-21 provides that the decision to rebuild must be made within 120 days or the property is removed from the provisions of the HPA, as set forth in notes 75-77 *supra.*

[89]The HPA leaves the coowners no options in the event they fail to elect to rebuild or reconstruct. *Id.*

[90]Such an endorsement prevents the carrier from deducting depreciation of the property from its settlement.

forced to rebuild the premises, at least to the extent of the face amount of the insurance policy;[91] however, when this same insurer is allowed merely to settle the claim it is typically permitted to deduct normal depreciation from the value of the improvements.[92] As a result, the cash received by the association or insurance trustee will usually be a fraction of the market value of the former living unit, after reduction for depreciation, land and improvements[93] below grade level. By forcing termination of the horizontal property regime the HPA could in many cases force the coowners to accept the insurance cash settlement in lieu of reconstruction, thereby untowardly reducing the total cash value of the property.

A third problem involving partial destruction can arise when an action for partition is litigated after the casualty and termination of the horizontal property regime. At that time, unless a partition in kind could be formulated, all the remaining units would be sold, whether damaged or not,[94] and the proceeds from the sales would be pooled with the insurance cash settlement.[95] In determining the respective shares in the cash proceeds the percentages of undivided interest would be applied to the total fund.[96] In the typical case, such a partition action would have the effect of forcing each cotenant who had not lost his unit in the casualty to share in the loss of equity of those cotenants who had. Whether this result is justifiable would depend upon the particular fact situations. For instance, it is possible that the cash settlement could be greater per unit than the actual sales prices of the remaining tenantable units. This could occur when it is obvious to potential home buyers that the remaining units do not constitute a viable horizontal property regime or townhouse project by reason of the high common expense per unit. In such case, the market value of the remaining units could be reduced to an amount less than the insurance settlement would have been in the event of their destruction.

It is apparent from the above discussion that the only meaningful solution is to delete those sections of the HPA which force a

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[91]The by-laws of a typical horizontal property regime will often compel the damaged property to be rebuilt by the coowners' association instead of placing such burden on the coowners individually. This duty is then usually passed on to the insurance carrier.

[92]Thus, all older buildings would receive substantial penalties upon casualty. This would force the coowners to carry much more insurance than the market value of the project. G. COUCH, CYCLOPEDIA OF INSURANCE LAW § 54:101 (2d ed. 1966).

[93]By definition, such items are not destructible by ordinary fire and are therefore not covered by fire insurance.

[94]IND. CODE § 32-1-6-21(d) (Burns 1973), as set forth in note 77 *supra.*

[95]*Id.*

[96]*Id.*

termination of the horizontal property regime upon casualty to the property.[97] Such sections could be replaced with a provision that until the reconstruction of damaged portions of the premises, voluntary removal may be accomplished with the consent of a substantial majority of the coowners. To protect the values of the units for the coowners, the HPA should require that the association purchase and maintain insurance with a replacement cost endorsement in an amount equal to at least eighty percent of the full replacement cost of the improvements, the proceeds of which would be payable to a competent independent insurance trustee. The trustee would, of course, be obligated to demand that the insurer commence reconstruction as soon as possible, assuming that the coowners do not voluntarily remove the property from the provisions of the HPA. To protect the property of those coowners who are able to remain on the property following the casualty, the trustee should be required to use part of the insurance proceeds to completely rebuild all buildings which contain tenantable units, reconnect all severed utilities, rebuild all necessary access ways, remove all debris, and return the balance of the project to at least a stable condition. If, in the meantime, the coowners have selected voluntary removal, the trustee should be required to complete the work on the damaged portions of the property in order to return them to a normal condition and be permitted to deduct all sums expended from the insurance settlement before such funds are included in the assets available for partition.

If the above suggestions were followed in HPA revisions, it would also be possible to provide that, in any partition action following partial destruction, the court could, first, partition as a whole the property of the cotenants whose units have not been reconstructed *in kind* from the property of those cotenants whose units are livable; second, create such easements and covenants as might be necessary to retain full rights of access and enjoyment for the livable units over the land partitioned in kind to the other cotenants; and, third, grant such partition requests as might be equitable and in accord with the above two provisions, including, at the court's option, a new form of continued self-government for the remaining coowners. The effect of these provisions would be to let all of the immediate economic loss from the casualty and election of non-reconstruction fall on those coowners who suffered the physical loss. Of course, while the market value of the remaining units may have been reduced and the common expenses increased as a result of the casualty and non-reconstruction of part of the original physical property, the majority of the economic

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[97] *Id.* § 32-1-6-21.

impact on the remaining coowners would not be suffered until they chose to sell their units. Both the state[98] and federal governments[99] have expressed a preference for homeownership in lieu of rental; by encouraging reconstruction the above suggestions for revisions to the HPA may cause it to be more in harmony with such public policy.

B. Description of a Condominium Unit

A problem related to both the insurance and taxation aspects of condominiums is whether a declarant may include within the description of the fee simple portion of the coowner's estate parts of the property which are not "enclosed" within the unit walls, floor, and ceiling.[100] It has been suggested that to include "external" property would subject the horizontal property regime to defeat and, if defeated, the coowners would be left without any statutory and/or agreed provisions for operation and maintenance of the external and common property.[101] Whether the coowners could adjust to these problems would depend upon the facts of each case; however, it is always preferable to avoid needless litigation.

The present definition of "apartment" unit was drawn from prior statutes designed to deal exclusively with highrise buildings;[102] however, virtually all condominium projects in Indiana have fewer than four stories.[103] In high-rise construction, almost all of the common property is involved in the mutual support of other units or the furnishing of other services common to all of the coowners; however, in low-rise construction, the emphasis is on individual use of common and limited common property with almost no need for support or the furnishing of common services.[104] In fact, in low-rise

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[98]Indiana allows a deduction from real property assessment of up to $1,000.00 in the event such property is encumbered by a mortgage. *Id.* § 6-1.1-12-1 (Burns Supp. 1976). Thus, the Indiana General Assembly has increased the ability of persons to own real property in Indiana.

[99]Interest and real property taxes are deductible from the federal income tax of typical homeowners. I.R.C. §§ 163(a), 164(a)(1).

[100]*See* IND. CODE § 32-1-6-2(a) (Burns 1973), as set forth in note 20 *supra.* An excellent discussion of this problem can be found in Bruce, *Eleven Years Under the Indiana Horizontal Property Act,* 9 VAL. U.L. REV. 1, 17, 21 (1974).

[101]Upon separation from the HPA, the horizontal property regime would have no existence and much of the documentation upon which the interests of the coowners depend would be rendered highly ambiguous, most notably the deeds of conveyance from the declarant.

[102]*See* MODEL STATUTE, *supra* note 23.

[103]For example, in Indianapolis there are no condominiums containing more than three stories.

[104]Many units in low-rise construction are of "ranch" design, having no other units above or below them.

construction many parts of the property which are normally constructed outside of an "enclosed" apartment space are designed and intended solely for the use of one or two units, such as air conditioning compressors, covered parking, patios and fences, utility extensions, meters, foundations, roofs, and exterior walls. To attempt to legally describe each and every physical part of the "external" property which is to be held in fee simple would obviously be unreasonably difficult, if not impossible.

The Florida Condominium Act has addressed this very problem of unit description and adopted a very liberal definition of "unit"[105] and "residential condominium."[106] The emphasis in Florida is placed on the intended use of the property in determining which parts of the property not enclosed within the walls of the unit are deemed to be included within the fee simple estate of the coowner.

The obvious solution to the problem in Indiana is to redefine in the HPA the permissible extent of the fee simple portion of the coowner's estate. Definitions of "apartment" which rely on the *intended use* of the property have been found in declarations in Indiana[107] and, from the point of view of decreasing the amount of

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[105]FLA. STAT. ANN. § 718.103(16) (West Supp. 1977) provides: " 'Unit' means a part of the condominium property which is subject to exclusive ownership. A unit may be in improvements, land, or land and improvements together, as specified in the declaration."

[106]

> "Residential condominium" means a condominium consisting of condominium units, any of which are intended for use as a private temporary or permanent residence, except that a condominium is not a residential condominium if the use for which the units are intended is primarily commercial or industrial and not more than three units are intended to be used for private residence, and are intended to be used as housing for maintenance, managerial, janitorial, or other operational staff of the condominium. If a condominium is a residential condominium but contains units intended to be used for commercial or industrial purposes, then, with respect to those units which are not intended for or used as private residences, the condominium is not a residential condominium.

Id. § 718.103(18).

[107]*See* Declaration of Horizontal Property Ownership, The Villas of Oakbrook Horizontal Property Regime, *supra* note 34, § 4 (a):

> Description of Apartments.
> (a) Appurtenances. Each Apartment shall consist of all space within the boundaries thereof as designated by the unit and building type together with all space within the garage area . . . and all portions of the Building situated within such boundaries . . .; provided, however, that all fixtures, equipment and appliances designed or intended for the exclusive enjoyment, use and benefit of an Apartment shall constitute a part of such Apartment, whether or not the same are located within or partly within the boundaries of such Apartment and shall be maintained by the Owner. Also, the interior surface of all doors and windows (excluding frames) in the perimeter walls of the Apartment and garage, whether or not located within or partly within the

common expenses and increasing the accuracy of the definition of fee simple property, the "intent" method appears worthy of adoption in Indiana. If so adopted, it would be desirable to allow the broader definition to apply retroactively to the date of the original passage of the HPA in order to permit compliance by those horizontal property regimes which included more property in the unit description than is apparently permitted under current law. The present restrictive definition of "apartment" unit in the HPA also contributes to much of the misunderstanding in the assessing of condominium units for purposes of real property taxation.

III. Real Property Taxation of Condominiums and Townhouses

All real property is, with few exceptions, subject to an ad valorem tax in Indiana.[108] The amount of the tax is calculated by multiplying the assessment of the property (net of any deductions or exemptions applicable to the property or the taxpayers)[109] by the local tax rate,[110] and subtracting therefrom the appropriate property tax replacement credit.[111] Inasmuch as the tax rate and replacement credit rate are supposed to be approximately equal for all similarly situated properties,[112] property tax liability is determined in large part by the assessed value of the property.

A general reassessment of all real property in Indiana is scheduled for completion in the near future.[113] Although some other

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boundaries of an Apartment, and all interior walls within the boundaries of an Apartment and garage are considered part of the Apartment.

[108]Ind. Code § 6-1.1-2-1 (Burns Supp. 1976) provides: "Property subject to tax.—Except as otherwise provided by law, all tangible property which is within the jurisdiction of this state on the assessment date of a year is subject to assessment and taxation for that year." *Id.* § 6-1.1-1-19 provides: " ' Tangible property' defined.—'Tangible property' means real property and personal property as those terms are defined in this chapter." *Id.* § 6-1.1-1-15 provides:

> "Real property" defined.—"Real property" means:
> (1) land located within this state;
> (2) a building or fixture situated on land located within this state;
> (3) an appurtenance to land located within this state; and
> (4) an estate in land located within this state, or an estate, right or privilege in mines located on or minerals, including but not limited to oil or gas, located in the land, if the estate, right, or privilege is distinct from the ownership of the surface of the land.

[109]*Id.* §§ 6-1.1-10-1 to -38, -12-1 to -28.

[110]*Id.* §§ 6-1.1-17-1 to -19.

[111]*Id.* §§ 6-1.1-21-1 to -12. Rather than operating as a reduction in assessment, the replacement credit is a direct reduction in the amount of tax owed by every taxpayer in the taxing district, *e.g.*, each taxpayer is to receive a twenty percent reduction in the amount of tax payable.

[112]Ind. Const. art. 10, § 1.

[113]Ind. Code § 6-1.1-4-4(a) (Burns Supp. 1976) provides in part: "A general reassessment of the real property of all counties of this state shall begin January 1,

states profess to reassess each property at market value every year, Indiana attempts to assess each property much less frequently.[114] All real property is assessed at the time of general reassessment[115] according to a set of standardized values promulgated by regulation and incorporated into the Indiana Real Estate Property Appraisal Manual by the Indiana State Board of Tax Commissioners.[116] After a complete reassessment has been accomplished for all existing properties it is theoretically possible to add newer properties to the tax assessment rolls by assessing them according to the values which were found in the 1968 Appraisal Manual used for the previous complete reassessment. The intended effect is to assess new properties at the values they would have had if they had been erected at the time of the last general reassessment.

Traditionally, at the commencement of each general reassessment a new manual is prepared in order to realign each type of property in relation to other types on the basis of "value."[117] In the past, such manuals have contained a great deal of cost-oriented data for use by the field assessors, but very little data related to resales of existing properties or calculation of the economic value of income-producing property.[118] The 1968 Appraisal Manual is very influential upon the assessing officials and it is unusual for them to assess anything not described in the 1968 Appraisal Manual or to select

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1976. This reassessment shall be completed on or before March 1, 1978 and shall be the basis for the taxes payable in 1979."

[114]*Id.*, third sentence, provides: "A similar reassessment of real property shall begin January 1, 1982, and each sixth [6th] year thereafter."

[115]*Id.*, as set forth in note 113 *supra*.

[116]*Id.* § 6-1.1-31-1 provides for the prescription and promulgation by the Indiana State Board of Tax Commissioners [hereinafter referred to as the Board] of various forms, rules, and regulations, including those "concerning the assessment of tangible property." Under former law, 1961 Ind. Acts, ch. 319, § 1401 at 927 (amended by 1963 Ind. Acts, ch. 333, § 29 at 824, to substantially the same effect as the above), the Board adopted on February 29, 1968 an amendment to Regulation No. 17, entitled "Indiana Real Estate Property Appraisal Manual." 1 BURNS' IND. ADMIN. RULES AND REGS. ANN. § (6-1.1-4-26)-1 (1976). The full text of the new Regulation No. 17 is reproduced in a looseleaf binder: STATE BD. OF TAX COMM'RS, INDIANA REAL PROPERTY APPRAISAL MANUAL (1968) [hereinafter cited as 1968 Appraisal Manual].

[117]The 1968 Appraisal Manual replaced the former manual, adopted as Regulation No. 17 on May 22, 1961: STATE BD. OF TAX COMM'RS, REAL ESTATE ASSESSMENT GUIDE No. 2 (2d ed. 1961).

[118]*See, e.g.*, 1968 Appraisal Manual, *supra* note 116, which sets forth a few general ideas about methods of appraising which are different from cost computation, but stresses very heavily the weight to be given replacement cost in the final assessment: *id.* at R57, and R69 (Residential), C1-C2 (Commercial and Apartment), I1 (Industrial), and F1-F4 (Agricultural and Rural).

values contrary to those listed therein.[119] In fact, the law is quite strict in its requirements for disclosure by such officials should they select criteria for valuation other than those available in the 1968 Appraisal Manual.[120]

While the ad valorem tax has been a source of state revenue from the beginning,[121] it is unremittingly subject to scrutiny and revision,[122] even to the point of constitutional amendment.[123] Recent changes have placed much responsibility and decision-making power in the hands of the Board.[124] Whether this responsibility can be fulfilled in respect to condominium and townhouse assessment is not known at this time because the 1976 Appraisal Manual now being used for the general reassessment represents a substantial change from the 1968 Appraisal Manual.[125] The discussion below will

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[119]IND. CODE § 6-1.1-31-5 (Burns Supp. 1976) provides:

Bases for determining true cash value.—

(a) The rules and regulations promulgated by the state board of tax commissioners are the basis for determining true cash value. Local assessing officials shall:

(1) comply with the rules, regulations, appraisal manuals, bulletins, and directives adopted or promulgated by the state board of tax commissioners;

(2) use the property tax forms, property tax returns, and notice forms prescribed or promulgated by the board; and,

(3) collect and record the data required by the board.

[120]*Id.* § 6-1.1-31-5(b) provides:

In assessing tangible property, the township assessors may consider factors in addition to those prescribed by the state board of tax commissioners if use of the additional factors is first approved by the board. Each township assessor shall indicate on his records for each individual assessment whether:

(1) only the factors contained in the board's rules, regulations, forms, and returns have been considered; or

(2) factors in addition to those contained in the board's rules, regulations, forms and returns have been considered.

[121]IND. CONST. art. 10, § 1.

[122]For example, Pub. L. No. 47, § 1, 1975 Ind. Acts 247, recodified the entire property tax article, current version at IND. CODE §§ 6-1.1-1-1 to -37-13 (Burns Supp. 1976), and made many substantive changes.

[123]A most significant recent constitutional amendment permited for the first time the exemption from taxation of certain classes of tangible personal property, intangible personal property, motor vehicles, mobile homes, airplanes, boats, trailers and similar property. IND. CONST. art. 10, § 1(a)(2)-(3), (b) (amended 1966).

[124]IND. CODE § 6-1.1-31-5 (Burns Supp. 1976), as set forth in notes 119 and 120 *supra.*

[125]It will require about two years to reassess all of the real property in Indiana, during which time it may be possible to analyze whether or not the use of the new manual has resolved the questions hereinafter raised. The new manual does not, however, appear to contain any sections dealing only with condominiums. STATE BD. OF TAX COMM'RS, INDIANA REAL PROPERTY APPRAISAL MANUAL (1976) [hereinafter cited as 1976 Appraisal Manual]; *but see id.* at RF-03, RF-04.

concentrate on the techniques currently used for assessing multi-family buildings, a comparison of these methods with the current law, and suggestions for amendments to the applicable statutes and regulations in order to provide for a more equitable method by which to assess condominiums.

A. The Effect of Taxation

For many Indiana property owners the amount of real property tax paid each year is the largest single expense of home ownership.[126] Accordingly, it is not surprising that the relative obligation for real property taxes payable can significantly affect the market value of property.[127] The effect of an excessive real property tax obligation can be financially devastating to an owner of a large parcel of real property; similarly, the owner of a smaller parcel may find that unusually high real property taxes may cause his home to have a lower resale value than would otherwise have been the case. The Indiana Constitution would appear to have adopted an approach requiring assessing officials to use their sound judgment in determining the relative values, and hence the relative assessed value, of property.[128] It is difficult to see how an approach utilizing sound judgment could lead to the conclusion that condominium properties having significantly different market values should receive *similar or equal* assessments merely because such properties also include an equal percentage of undivided interest in certain common property. Unfortunately, it is the latter approach which prevails in the current assessing practices of condominiums in Indiana.[129] As a result, to the extent that the percentages of undivided interest as set forth in the declaration do not represent the respective fair market values of the various units, those units with high percentages of undivided interest

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[126]Mortgage payments may or may not be greater than the property tax; however, mortgage payments represent a repayment of money borrowed, not an incidence of home ownership. Utility expenses may foreseeably exceed property tax obligations in some cases.

[127]For instance, at a home mortgage interest rate of nine percent per annum, the mortgage payment for principal and interest is equal to about ten percent of the amount borrowed on the mortgage note. If, therefore, a buyer were comparing two properties of equal size and condition, one property having annual property taxes equal to an amount $100 greater than the other, the buyer would be justified in paying $1,000, or ten times the annual difference in real property taxes, more for the property with the lower taxes. This is an example of a reverse multiplier.

[128]IND. CONST. art. 10, § 1 provides in part: "Assessment and taxation.—(a) The General Assembly shall provide, by law, for a uniform and equal rate of property assessment and taxation and shall prescribe regulations to secure a just valuation for taxation of all property, both real and personal."

[129]For example, compare the methods used in Exhibits D and E to Exhibit C *infra*.

and low total market values will bear an inequitably larger share of the real property tax burden than those with low percentages of undivided interest and high market values.[130]

B. Current Methods of Assessing Multi-Family Dwellings

Although the 1968 Appraisal Manual occasionally makes references to other methods of appraising,[131] the bulk of the 1968 Appraisal Manual deals with estimating the depreciated replacement cost of improvements.[132] In addition, although taxes are imposed on the owners of the assessed real property,[133] the 1968 Appraisal Manual does not provide a method of separating a given parcel of real property according to various ownership interests, particularly where such ownership interests are of the type typically found in condominiums. The following four examples indicate the various ways in which the same hypothetical parcel of real property might have been assessed under current practice, depending on the manner of ownership.

1. Current Assessment Method for Apartments

There is a standard assessment method used for assessing apartment projects in Indiana.[134] In making such an assessment, the assessing official will typically follow these steps:

a. Visit the property and make note of the physical dimensions of buildings, garages, porches, patios and the like.

b. Count the number of special features, such as fireplaces, extra plumbing fixtures, air conditioners and the like.

c. Observe the percentage of brick exterior as opposed to mere frame exterior, observe the general level of quality and design and make note of estimated depreciation.

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[130]For example, compare Units A and D on Exhibits C and D *infra.*

[131]See note 118 *supra.*

[132]To find depreciated replacement cost the 1968 Appraisal Manual sets forth ranges of various cost factors to be applied to the areas of the buildings being assessed. The cost factors are found in the 1968 Appraisal Manual, *supra* note 116, at R62-R64, C52, C67, I35-I36, and F49-F50, and vary according to the type of property being assessed. Unfortunately, not all possible forms of improvement may be covered in any manual; therefore, the assessing official must use his judgment in either assigning a value to something not covered in the 1968 Appraisal Manual or disregarding it for tax purposes.

[133]IND. CODE § 6-1.1-2-4(a) (Burns Supp. 1976) provides: "The owner of any tangible property on the assessment date of a year is liable for the taxes imposed for that year on the property."

[134]Exhibit B *infra* is an example of the standard method. *See generally* real property assessments for various apartment projects located in Pike and Washington Townships, Marion County, Indiana, available at the respective Township Assessors' offices in the City-County Building, Indianapolis, Indiana.

d. Using some of the above data, estimate from the Apartment Pricing Schedule[135] the cost per square foot per floor of the building.

e. Add air conditioning as an additional cost factor per square foot.

f. Multiply the total square foot cost factor by the appropriate number of square feet to find a subtotal base value before additions.

g. Add all additional appropriate items, such as patios, to the subtotal base value. The cost factors for these items are found in the Commercial or Residential sections of the 1968 Appraisal Manual.[136]

h. Multiply the total of the above amounts by a "Grade Factor"[137] which is based upon the judgment of the assessing official as to the relative quality of the building.

i. Multiply the above result by a cost and design factor to adjust for quality of design and cost differences based on the county where the real property is located.[138]

j. Allow for estimated depreciation.[139] The result is known as the "true cash value" of the improvements.

k. Divide the above true cash value by three to find the assessed value of the improvements.[140]

l. Multiply the land area of the project, usually expressed in acres, by the standard value per acre used in the general locale for apartment land. The value per acre is generally fixed at the time of general reassessment by the Board and not varied within a district, regardless of differences in location, topography, or desirability. The result is known as the true cash value of the land.

m. Divide the true cash value of the land by three to find the assessed value of the land.[141]

n. The true cash values of improvements and land are added to find the total true cash value of the property. The assessed values of improvements and land are added to find the total assessed value of the property. The tax rate is applied only to the total assessed value.

2. Current Assessment Method for Townhouses

A standard method for assessing townhouse projects has also developed in Indiana.[142] In many ways this method is identical to that

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[135]*See* 1968 Appraisal Manual, *supra* note 116, at C67, reproduced as Exhibit A *infra.*

[136]*Id.* at C1-C2, C57-C67, R4-R5, and R57-R59.

[137]*Id.* at R4-R6.

[138]*Id.* at R7.

[139]*Id.* at R57-R59.

[140]IND. CODE § 6-1.1-1-3 (Burns Supp. 1976).

[141]*Id.*

[142]An example of the standard townhouse assessment method, applied to the same hypothetical project as the apartment method, is contained in Exhibit C *infra.* This

used for assessing apartment projects; however, there are a few significant differences:

a. Instead of applying cost factors to the building as a whole, similar factors are applied to each townhouse unit, measured to the centerlines of party walls[143] and the outside of exterior walls.

b. Additional features are assigned individually to the townhouse units instead of spreading the value of such features uniformly over the entire project.

c. A separate tax parcel is created for the common property which, as mentioned above, is typically owned by a not-for-profit corporation.

d. The land owned by each townhouse owner is separately assessed to such owner together with the total for his respective townhouse unit. Thus, each townhouse owner pays a tax computed on his own unit, including all improvements and a separate parcel of land. Each townhouse owner also shares in the payment of the real property tax on the common property by payment of his monthly common charge to the not-for-profit corporation.

3. Current Assessment Method for Condominiums Using Percentage Interest for Allocation

Two methods of assessing condominiums have been developed by the Board. The first method[144] is identical to that used for assessing apartment projects, except that in dividing the total assessed value of the project among the various coowners the Board apportions the assessed value on the basis of the percentage of undivided interest which each coowner owns in the common property. While this method may be appropriate for allocating the assessed value of the *common* property to the unit owners, it is obviously inappropriate for allocating those parts of the property owned in *fee simple*, for in many cases the percentages of undivided interest will have no relation to the relative values of the fee simple estates. The fact that such a

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method is similar to the one employed on Chatham Walk townhouses, as found in the Office of the Warren Township Assessor, located in the City-County Building, Indianapolis, Indiana.

[143]A party wall is one which separates two units from each other, as opposed to a wall located entirely within a unit or an exterior wall.

[144]An example of this type of condominium assessment method, applied to the same hypothetical project as the apartment method, is contained in Exhibit D *infra*. This method was applied to the Lake Forest Horizontal Property Regime property, the assessments of which are located in the Office of the Pike Township Assessor, located in the City-County Building, Indianapolis, Indiana. A joint appeal by the declarant and the coowners to the county board of review has resulted in a revision of the assessment substantially in conformance with the method demonstrated in Exhibit F *infra*.

method may be simple for the assessing official and easily understood by the taxpayer is superficially persuasive; however, it should not be allowed to be conclusive.

4. Current Assessment Method for Condominiums Deducting Fifty Percent Fee Before Allocation

The second method[145] used in Indiana for assessing condominiums is identical to that used for townhouses up to but not including the point of determining the true cash value of the improvements. Under this method, the assessing official arbitrarily allocates one-half of the buildings to the common property true value and apportions the new sum of all common property true value to the units according to their respective percentages of undivided interest in the common property. Use of this method appears more often in buildings where there are semi-public halls contained within the buildings. The values of the halls are also estimated separately and allocated to the common property. This method may provide less distortion of assessed value vis-a-vis market value; however, it suffers from many of the same basic inequities and legal difficulties as the first method for assessing condominiums.

C. The State of the Law

In order to provide more meaningful guidance to assessing officials in their task of equitably distributing the property tax burden among condominium coowners, the Indiana General Assembly should (1) carefully redefine "assessed value" for purposes of property tax law, (2) redefine "apartment" under the HPA in terms such that it may be assessed according to typical assessment methods, and (3) set forth the limits of "discretion" which may be exercised in assessing condominiums before the assessing officials become subject to judicial criticism.

1. The Requirement of Separate Tax Parcels

It is perhaps less time-consuming to assess an apartment building as a whole than to divide it into various hypothetical parts. Similarly, as the number of tax parcels increases the amount of time and money required to maintain proper records and process tax bills increases. However, both the HPA and the property tax laws prescribe that

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[145]An example of this second type of condominium assessment method, applied to the same hypothetical project as the apartment method, is contained in Exhibit E *infra*. This method was applied to the Kings Cove Horizontal Property Regime property, the assessments for which are located in the Office of the Washington Township Assessor, located in the City-County Building, Indianapolis, Indiana.

each owner is under a personal obligation to pay his own taxes,[146] whatever they may be, thus requiring the assessing official, with few exceptions, to divide the real property assessment according to legal ownership.

2. Difficulty of Administrative and Judicial Relief

The requirement of separate parcels may prove to be a disadvantage for the coowner as well. When combined with the additional

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[146]As set forth in the HPA:

> Taxes and assessments.—Taxes, assessments and other charges of this state, or of any political subdivision, or of any special improvement district, or of any other taxing or assessing authority shall be assessed against and collected on each individual apartment, each of which shall be carried on the tax books as a separate and distinct entity for that purpose, and not on the building or property as a whole. No forfeiture or sale of the building or property as a whole for delinquent taxes, assessments or charges shall ever divest or in anywise affect the title to an individual apartment so long as taxes, assessments and charges on said individual apartment are currently paid.

IND. CODE § 32-1-6-17 (Burns 1973). As set forth in respect to property tax:

> "Owner" defined.—(a) For purposes of this article [6-1.1-1-1 — 6-1.1-37-13], the "owner" of tangible property shall be determined by using the rules contained in this section.
>
> (b) Except as otherwise provided in this section, the holder of the legal title to personal property, or the legal title in fee to real property, is the owner of that property.
>
> (c) When title to tangible property passes on the assessment date of any year, only the person obtaining title is the owner of that property on the assessment date.
>
> (d) When the mortgagee of real property is in possession of the mortgaged premises, the mortgagee is the owner of that property.
>
> . . . .
>
> (f) When a life tenant of real property is in possession of the real property, the life tenant is the owner of that property.

Id. § 6-1.1-1-9 (Burns Supp. 1976); *id.* § 6-1.1-1-15 (1) (definition of real property) and *id.* § 6-1.1-1-19 (definition of tangible property), as set forth in note 108 *supra; id.* § 6-1.1-2-4 ("Person liable for taxes"), as set forth in note 133 *supra; id.* § 6-1.1-4-1 provides: "Place of assessment—To whom assessed.—Real property shall be assessed at the place where it is situated, and it shall be assessed to the person liable for the taxes under IC 1971, 6-1.1-2-4 [*Id.* § 6-1.1-2-4]"; *id.* §§ 6-1.1-4-2, -3. Under former law as under current law, general taxes were a personal liability of the owner. The courts have held that such personal liability did not by itself relieve the real property from the property tax lien without payment of the tax. Schofield v. Green, 115 Ind. App. 160, 56 N.E.2d 506 (1944). It was early established that the owner of property, as evidenced by the legal title, as of the assessment date, the first day of March, is the person liable for payment of the property taxes levied thereon for that year, even though not due and payable until the next succeeding year. Riggs v. Board of Comm'rs, 181 Ind. 172, 103 N.E. 1075 (1914); Mullikin v. Reeves, 71 Ind. 281 (1880); City of Richmond v. Scott, 48 Ind. 568 (1874); *see* Lose v. State, 72 Ind. 285 (1880); King v. City of Madison, 17 Ind. 48 (1861); Corr v. Martin, 37 Ind. App. 655, 77 N.E. 870 (1906).

requirement that appeals of assessments must be brought by taxpayers,[147] the above requirement would indicate that a condominium coowner is at a disadvantage under the current method of assessing condominiums, for he must be prepared to challenge the assessment of the entire property, not just his unit.[148] The burden of proving that the total assessment is unjustified would be much more difficult for a large project than for one house.[149] The alternatives for the complaining taxpayer are to organize as many of his coowners as possible for a joint appeal or convince the Board of Directors of the coowners' association to prosecute the appeal.[150] A successful class

[147]Standing appears to be required to the extent that in order to "obtain a review by the county board of review of a county or township official's action with respect to the assessment of the taxpayer's tangible property" the complainant must be the *taxpayer*. IND. CODE § 6-1.1-15-1 (Burns Supp. 1976). To "obtain a review by the state board of tax commissioners of a county board of review's action with respect to the assessment of that taxpayer's tangible property" the complainant must be the *taxpayer*. *Id.* § 6-1.1-15-3. But the "appeal" of "the state board of tax commissioner's final determination regarding the assessment of his tangible property" may be taken by "[a] *person.*" *Id.* § 6-1.1-15-5. It is probably intended that the "owner" is the person entitled to prosecute the appeal, regardless of level. *Id.* § 6-1.1-2-4. The courts of Florida have inferred the same view. *Cf.* Commodore Plaza at Century 21 Condominium Ass'n, Inc. v. Saul J. Morgan Enterprises, Inc., 301 So. 2d 783 (Fla. Dist. Ct. App. 1974) (condominium association held to have no standing to bring a quiet title action on behalf of the coowners); Hendler v. Rogers House Condominium, Inc., 234 So. 2d 128 (Fla. Dist. Ct. App. 1970) (no class action to quiet title to common property in the coowners was allowed).

[148]See, for example, the calculation of individual assessments based entirely upon a total assessment, as in Exhibit D *infra*, and the even more complex adjustments involved in the assessment shown in Exhibit E *infra*.

[149]Ordinarily, the burden of proof is on the complainant. However, the complainant must prove more than that the contested assessment is somehow inappropriate; rather, he must allege and prove that the assessing official acted arbitrarily and capriciously in assessing the property. If he does not fulfill this second requirement, the court will not change the assessment of complainant's property, regardless of how unreasonable it may appear when compared to other similar properties. State Bd. of Tax Comm'rs v. Traylor, 141 Ind. App. 324, 228 N.E.2d 46 (1967). The *Traylor* case is approvingly cited in the 1968 Appraisal Manual, *supra* note 116, at 29.

[150]Although the HPA appears to grant standing to the coowners' association board of directors for this purpose, this does not mean that an aggrieved taxpayer has an unlimited right to compel the Board of Directors to prosecute tax assessment appeals.

> Suits on behalf of apartment owners—Service of process upon apartment owners.—Without limiting the rights of any apartment owner, actions may be brought by the manager or board of directors, in either case in the discretion of the board of directors, on behalf of two [2] or more of the apartment owners, as their respective interests may appear, with respect to any cause of action relating to the common areas and facilities or more than one apartment. Service of process on two [2] or more apartment owners in any action relating to the common areas and facilities or more than one apartment may be made on the person designated in the declaration to receive service of process.

IND. CODE § 32-1-6-30 (Burns 1973).

action would appear unlikely because of the possibility that not all members of the class would gain from successful prosecution of the appeal.[151] Therefore, an assessment would probably be appealed only when a majority of the coowners were adversely effected by the property tax assessment and instructed the Board of Directors to act on their behalf. The expenses of such an appeal could be borne as a common expense.[152]

3. Effective Date of Valuation v. Effective Date of Assessment

Another issue involves the proper assessment of nonagricultural land.[153] Under the present statute[154] land is to be reassessed upon any change in use or zoning. In contrast, improvements are only required to be reassessed upon a change in the physical structure.[155] In the past, the 1968 Appraisal Manual has made it possible to add *new improvements* to the tax rolls at assessed values similar to those of older properties;[156] however, because the 1968 Appraisal Manual does not set forth the values to be applied to vacant *land*, some doubt has been raised as to whether such land, when put to a new use or rezoned, should be added to the tax rolls at its current market value or at the market value it would have had if its new use had been effective on the date of the last general reassessment.[157] If the land is reassessed at its current market value, then the combined effects of

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[151] IND. R. TR. P. 23(a)(1), (2), (4).

[152] IND. CODE § 32-1-6-2(g) (Burns 1973).

[153] *Id.* § 6-1.1-4-13(a) (Burns Supp. 1976) provides: "In assessing or reassessing land, the land shall be assessed as agricultural land as long as it is devoted to agricultural use." By implication, all land not devoted to agricultural use would be classified as nonagricultural land. The effective date of all assessments is March 1st. *Id.* § 6-1.1-1-2.

[154]

> Reassessment of subdivided and rezoned land.—If land assessed on an acreage basis is subdivided into lots, the land shall be reassessed on the basis of lots. If land is rezoned for, or put to, a different use, the land shall be reassessed on the basis of its new classification. If improvements are added to real property, the improvements shall be assessed. An assessment or reassessment made under this section is *effective* on the *next* assessment date. However, if land assessed on an acreage basis is subdivided into lots, the lots may *not* be *reassessed* until the next assessment date following a transaction which results in a change in legal or equitable title to that lot.

Id. § 6-1.1-4-12 (emphasis added).

[155] *Id.*

[156] The effective date for determining the *value* of all *improvement* assessments is set at January 1967. *See* the 1968 Appraisal Manual, *supra* note 116, at R7.

[157] IND. CODE § 6-1.1-4-12 (Burns Supp. 1976), fourth sentence, as set forth in note 154 *supra*, is ambiguous in respect to the point in time of valuation of the land, as opposed to the date the reassessment changes the tax rolls.

infrequent general reassessments and rapid inflation of land values will cause many landowners to pay more than their proper share of property tax.[158] Surely it is well-recognized that land value is determined by more factors than simply its present use or zoning status.[159] Therefore, it seems unwise to allow two such narrow factors to so greatly influence the assessing procedure and valuation. Perhaps in partial recognition of the inequity of this provision, the most recent amendment[160] to this section of the statute relieved subdivision developers from the reassessment of their newly-developed lots until such time as the lots had been sold.[161] Unfortunately the amendment did not specify whether at the time of such reassessment to use the current or historic values of the lots.[162] This question is important to condominium developers because it typically requires a period in excess of two years to rezone, build and finally sell all of the units in a project of average size. The obviously harmful effects of this discriminatory valuation process, if so applied by the assessing official, would be contrary to the apparent intent of the law.

4. Determination of Correct Assessed Value

Before using a term such as "assessed value" it is necessary to define "value." Unfortunately, the Indiana General Assembly and the courts appear to disagree as to both the underlying definition of "value" and who shall have the final right to define it.

a. Market Value vis-a-vis True Cash Value

Currently, "assessed value" is defined in the law as one-third of "true cash value."[163] However, "true cash value" is not defined therein. The search for judicial interpretation of "true cash value" reveals that the basic constitutional directive for determining the proper valuation of property for purposes of taxation has remained unchanged since the passage of the Indiana Constitution of 1851: "The General Assembly shall provide, by law, for a uniform and equal rate of property assessment and taxation and shall prescribe

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[158]A similar situation is examined in note 38 *supra.*

[159]AMERICAN INSTITUTE OF REAL ESTATE APPRAISERS, THE APPRAISAL OF REAL ESTATE 1-2 (5th ed. 1967) lists 24 forces which create value.

[160]Pub. L. No. 49, § 1, 1975 Ind. Acts 470.

[161]IND. CODE § 6-1.1-4-12 (Burns Supp. 1976), fifth sentence, as set forth in note 154 *supra.*

[162]*Id.*

[163]*Id.* § 6-1.1-1-3 provides: " 'Assessed value' or 'assessed valuation' defined.—'Assessed value' or 'assessed valuation' means an amount equal to thirty-three and one third percent [33 1/3%] of the true cash value of property."

regulations to secure a just valuation for taxation of all property, both real and personal."[164] The question of whether an assessment of a specific property was correct has more often than not become overshadowed by other issues in the same litigation, such as whether "value" meant "true cash value" or "assessed value,"[165] or the definition of "true cash value."[166] Thus, neither the courts nor the Indiana General Assembly have forthrightly defined the constitutional requirement as one requiring that all property must be assessed at its "market value"[167] or some fraction thereof.[168]

In contrast, the courts of Florida have avoided this difficulty by defining "assessed value" as "fair market value" concomitant with interpreting a constitutional section almost identical to that of the Indiana Constitution.[169] The Florida legislature, in a manner similar to that of Indiana, has delegated to an administrative agency the duty to determine assessment standards. However, the regulations

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[164]IND. CONST. art. 10, § 1.

[165]*See* Allen v. Van Buren Twp., 243 Ind. 665, 184 N.E.2d 25 (1962), in which carefully chosen words were presumed to have been used in the Indiana Constitution, *e.g.*, "just valuation." In holding that "value" in art. 13, § 1 of the Indiana Constitution means one-third of that value found by use of the rules and regulations of the Board, the supreme court disassociated the definition of "value" from its connection with the market place and associated it with government-created standards for some purposes.

[166]*See* Smith v. Stephens, 173 Ind. 564, 91 N.E. 167 (1910).

[167]*See* State Bd. of Tax Comm'rs v. Chicago, Mil., St. P. & Pac. R.R., 121 Ind. App. 302, 310, 96 N.E.2d 279, 283 (1951), wherein it was held that the taxpayer was not entitled to the lowest assessed value which could be found by all various methods of appraising, and that the Board need not apply specified methods or use specified facts in reaching its decision if the final result is not fraudulent, capricious or arbitrary, *citing* Southern Ry. v. Watts, 260 U.S. 519, 527 (1923). The Board appears to have used decisions such as this to relieve it of any requirement to achieve market value in its assessments. This case is set forth as an example of the above proposition in the 1968 Appraisal Manual, *supra* note 116, at 29.

[168]Some older holdings appeared to define "true cash value" in terms which might be construed as implying "market value." In Willis v. Crowder, 134 Ind. 515, 34 N.E. 315 (1893), the supreme court interpreted the meaning of "true cash value" contained in former REV. STAT. 1881, § 6330, to be equal to "market selling price"; however, the court held that if there were no market for the property, the "true cash value" was to be defined as the actual value to the owner, as set forth in the owner's statement of assessment. *See* Allen v. Van Buren Twp., 243 Ind. 665, 681-84, 184 N.E.2d 25, 32-34 (1962) (dissenting opinion), wherein Landis, J., expressed the view that "value" was most frequently interpreted to mean "market value," *e.g.*, related to the sale of properties, as perhaps opposed to "assessed value" or other artificially constructed "values"; Smith v. Stephens, 173 Ind. 564, 91 N.E. 167 (1910), wherein it was held that the fact that all other property may be undervalued is irrelevant to the legal mandate that property be assessed at full cash value, State *ex rel.* Lewis v. Smith, 158 Ind. 543, 565, 63 N.E. 25, 216 (1902) (dissenting opinion), *citing* Willis v. Crowder.

[169]*Compare* FLA. CONST. art. VII, § 4 *with* IND. CONST. art. 10, § 1. Fair market value has been defined as "the amount a 'purchaser willing but not obligated to buy, would pay to one willing but not obligated to sell.' " Walter v. Schuler, 176 So. 2d 81, 86 (Fla. 1965), *quoting* Root v. Wood, 155 Fla. 613, 618, 21 So. 2d 133, 138 (1945).

promulgated by said agency are no longer deemed to be prima facie in conformance with the Florida Constitution but merely "deemed prima facie correct."[170] In addition, the Florida Department of Revenue, an administrative agency similar to the Indiana State Board of Tax Commissioners, is required by statute to prepare a manual for assessments which is continually revised[171] in order to permit assessments to be at correct levels of "just valuation."[172] The courts of Florida seem to have accepted the idea that the legislature has the power to define "market value." This follows from the fact that the courts will set aside an assessment only when there is an allegation that the assessment was not in compliance with the statute, rather than permitting a challenge to the constitutionality of the definition of market value as expressed in the statute.[173]

As mentioned above, the Indiana General Assembly has attempted to define "uniform and equal rate of property assessment"[174] and "just valuation"[175] by delegating to the Board[176] the authority to establish regulations for determining such values.[177] The 1968 Appraisal Manual reproduces the statutory language setting forth the methods and instructions for classifying and valuing real property for the use of the assessing official.[178] However, in many assessment appeals, the question initially raised before the county board of review[179] is not

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[170]*Compare* FLA. STAT. ANN. § 195.032 (West Supp. 1977) *with id.* (West 1971).

[171]FLA. STAT. ANN. §§ 195.042, 195.052 (West 1971).

[172]FLA. CONST. art. IX, § 1 (current version at *id.* art. VII, §§ 2 and 4); as interpreted in Walter v. Schuler, 176 So. 2d 81 (Fla. 1965).

[173]The courts do not decide the ultimate constitutional issue of whether or not the contested assessment is equal to "market value." *See* Powell v. Kelly, 223 So. 2d 305, 308 (Fla. 1969), in which the court announced the rule that it would not overturn an assessment made pursuant to the guidelines of the statute unless the complainant establishes bad faith and essential inequality or unjustness of the assessment by allegation and proof, to the exclusion of every reasonable hypothesis of legal assessment; Dade County v. Salter, 194 So. 2d 587, 591 (Fla. 1967), in which the court set up a potentially enormous burden of proof for the complainant when it stated that he might obtain a reduction in assessment if he could prove that the assessing official had systematically valued property in his jurisdiction at less than 100 percent of fair market value, *citing* Sioux City Bridge Co. v. Dakota County, 260 U.S. 441 (1923). The assessed value is supposed to be "fair market value." Walter v. Schuler, 176 So. 2d 81, 85-86 (Fla. 1965); Lanier v. Overstreet, 175 So. 2d 521 (Fla. 1965); Graham v. City of West Tampa, 71 Fla. 605, 71 So. 926 (1916); McArthur Jersey Farm Dairy, Inc. v. Dade County, 240 So. 2d 844, 847 (Fla. Dist. Ct. App. 1970).

[174]IND. CONST. art. 10, § 1(a).

[175]*Id.*

[176]IND. CODE §§ 6-1.1-31-1, -2-2 (Burns Supp. 1976).

[177]*Id.* § 6-1.1-31-5, as set forth in notes 119-20 *supra.*

[178]*See* 1968 Appraisal Manual, *supra* note 116, at 17-18.

[179]The county board of review is the first level of appeal for an aggrieved taxpayer. IND. CODE §§ 6-1.1-13-1, -6 (Burns Supp. 1976).

whether the assessing official acted in accordance with the statute and regulations, but rather the justness of the assessed value of the complainant's property in relation to similar properties.[180] This type of appeal, therefore, consists of an allegation that the assessment of complainant's property is "too high" vis-a-vis some ascertainable standard of "value" other than that contained in the 1968 Appraisal Manual. In real property appraisal terminology, the question would be whether or not the assessment was supposed to approximate "market value"[181] or be left to the discretion of the assessing official within the limitations of the 1968 Appraisal Manual. Thus, the challenge is very often necessarily directed not at the actions of the assessing official but rather at the regulations as contained in the 1968 Appraisal Manual.

Assuming that the Indiana Constitution requires that real property assessments should bear a direct correlation to market value, the question then becomes one of deciding if the current assessment practices typically develop market value. An accurate estimate of market value is often a difficult undertaking. As a result, several professional real property appraisal groups have been formed in an effort to standardize and organize the appraisal of real estate. A comparison of the professionally accepted definition of market value with the operation of the assessment system in Indiana reveals some interesting dissimilarities. All major professional real estate appraisal organizations would agree with the definitions of "market value" published by the American Institute of Real Estate Appraisers:

> (1) [T]he highest price estimated in terms of money which a property will bring if exposed for sale in the open market allowing a reasonable time to find a purchaser who buys with knowledge of all the uses to which it is adapted and for which it is capable of being used.
> (2) Frequently, it is referred to as the price at which a willing seller would sell and a willing buyer would buy, neither being under abnormal pressure.
> (3) It is the price expectable if a reasonable time is allowed to find a purchaser and if both seller and prospective buyer are fully informed.[182]

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[180]With the exception of the general reassessment, the only way that a taxpayer would know or suspect that the assessment on his property is significantly high or low would be by comparing it to other similar properties. The reason the taxpayer would make such a comparison is, of course, because he believes that there should be a direct correlation between the market values and assessed values of similar properties.

[181]See the definition of "market value" in the text accompanying note 182 *infra*.

[182]AMERICAN INSTITUTE OF REAL ESTATE APPRAISERS, APPRAISAL TERMINOLOGY AND HANDBOOK 131 (5th ed. 1967).

These definitions all include subjective elements of judgment on the parts of buyer and seller in arriving at the sale price.[183] The purpose of most real estate appraisal publications is to aid appraisers in the accurate prediction of the market value of real property.[184] The appraiser's estimate is almost invariably communicated to his client by written report.[185] Such reports will, with rare exception, contain an extended analysis of the reasons for the appraiser's estimate.[186] In this analysis the appraiser will typically indicate the consideration given to each of the three principal methods for estimating value: the cost approach, the income approach, and the market data approach.[187] Thus, to achieve an estimate of "market value," the professional real estate appraiser must have the knowledge and training to apply as many as three different methods for estimating value. While there is currently not a requirement that all persons who may testify as to real property values must be qualified experts, there remains considerable reliance upon such experts in eminent domain actions and at other times when the court or the jury needs guidance with respect to valuation of a particular property. Therefore, it would seem reasonable that the county board of review should recognize the

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[183]AMERICAN INSTITUTE OF REAL ESTATE APPRAISERS, THE APPRAISAL OF REAL ESTATE 20-22 (5th ed. 1967).

[184]*Id.* at 2.

[185]*Id.* at 3.

[186]*Id.* at 373-74.

[187]*Id.* at 327-50. The extent of the consideration and the weight of the value estimate found under each approach will depend to a great extent upon the type of property being appraised. *Id.* at 374-77. In valuing real property, the appraiser is well-advised to view the property as much as possible through the eyes of the typical buyer. For instance, the reproduction costs and sales prices of single-family residences are typically well known to buyers and sellers, although rental and expense information is not well known; therefore, the cost and market data approaches have considerable validity while the income approach is almost meaningless in appraising single-family residences. Conversely, the typical investor in income-producing property is one who emphasizes return on investment to the exclusion of other measures of value; therefore, because the income approach strives to achieve an estimate of market value based upon a desired rate of return on investment, it is more valid for these types of property than the other two approaches. *Id.* at 374. The reason for this is that income-producing projects are unique in many respects and rely on so many extraneous factors for value that it would neither be valid to compare such projects to dissimilar property nor informative to estimate mere reproduction cost without adjustment in each case for factors related to the determination of the value estimated by means of the income approach. For example, the cost approach requires an analysis of depreciation, which in turn requires an analysis of economic obsolescence, which requires an adjustment for lost net income due to location and competition. *Id.* at 217-18. Similarly, in order to apply the principles of the market data approach, the professional appraiser often uses the gross rent multiplier, thus utilizing much of the same information as is needed in the income approach. *Id.* at 351-55.

validity of the principles used by virtually all professional appraisers to the same extent as they are recognized by the courts.

An analysis of the 1968 Appraisal Manual discloses that except for a few general words with respect to the use of market data[188] and income and expense[189] information, there is almost a total reliance upon cost factors for estimating the value of real property for assessment purposes. In fact, at the assessment level, there is very little activity directed toward collecting current market information with respect to sales of land or improved property.[190] The manual sets forth the following general principle for income-producing real property valuation: "As with residential property, the object of the appraiser is to reproduce the replacement value based upon actual material and labor cost as of January 1967."[191] As has been true with the past manuals and 1968 Appraisal Manual, it appears that the purpose of the 1976 Appraisal Manual is the estimation of reproduction cost to the almost total exclusion of value as found under the income and market data approaches to value.[192] Thus it is probable that in many cases the assessment of real property in Indiana will bear a less direct correlation with its market value than might be the case if the Board had promulgated rules and regulations which included more use of market data and income and expense information.

b. Delegation of Power to Determine "True Cash Value"

Assuming, arguendo, that in many cases competent assessing officials using either the 1968 or 1976 Appraisal Manual in good faith, to the best of their abilities, cannot accurately estimate the market value of real property, it does not necessarily follow that such assessments can be successfully challenged on appeal. Both the Board and some courts have accepted a literal interpretation of the statute[193] by holding that any assessment performed in accordance with the manual will be left unaltered unless the complainant can show substantial and harmful wrongdoing on the part of the assessing official.[194] There has, however, been a closer reading of the

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[188]*See* the 1968 Appraisal Manual, *supra* note 116, at R69, C1-C2, I1.

[189]*Id.* at R57, C1-C2, F1-F4, I1.

[190]Strict adherence to the forms of the Board used in assessing does not require collection or use of comparative data. *Id.* at R81-R82.

[191]*Id.* at C1.

[192]*See* 1976 Appraisal Manual, *supra* note 125.

[193]IND. CODE §§ 6-1.1-31-1(3), -5(a) (Burns Supp. 1976).

[194]State Bd. of Tax Comm'rs v. Traylor, 141 Ind. App. 324, 228 N.E.2d 46 (1967); State Bd. of Tax Comm'rs v. Chicago, Mil., St. P. & Pac. R.R., 121 Ind. App. 302, 96 N.E.2d 279 (1951).

statute by a recent case which,[195] when contrasted with an earlier holding,[196] indicates that perhaps the courts of Indiana are tending toward the view that "true cash value" should be defined as "market value" for purposes of conforming to the Indiana Constitution.

In the earlier case, *Indiana State Board of Tax Commissioners v. Pappas*,[197] the court adopted the position that the 1968 Appraisal Manual, once having been fully adopted as a regulation pursuant to statutory requirement, "ha[s] the force of law and [is] the state-wide standard used by the State Board of Tax Commissioners (as well as all assessing officials) in determining the correctness of an assessment on appeal."[198] In *Pappas*, the complainant had appealed the assessment of his home to the county board of review and, not being satisfied with the result, appealed next to the Board for more relief. Complainant was granted no further relief and appealed to the Superior Court of Marion County. The court heard evidence which had not been presented to the Board and entered judgment in favor of the complainant in the form of a further reduction of his assessment. Appeal to the court of appeals was taken by the Board in an effort to have the judgment of the superior court set aside and the case remanded to the Board for reassessment. The only issues on appeal were the admission by the superior court of evidence which had not been heard at the administrative level, whether the hearings before the Board met the requirements of constitutional due process, and whether the superior court had exceeded its authority in revising the assessment instead of remanding the case to the Board. The court of appeals quoted extensively from the then current version of the present tax laws[199] and held that the 1968 Appraisal Manual has the *force of law*.[200] This holding was unsupported by authorities and appears to have been unnecessary to decide any of the points raised by the parties on appeal. More particularly, the question of whether the statute which allows the Board to set forth the definition of assessed value, without requiring that the assessed value bear a direct relation to market value, represents an unconstitutional delegation of power appears not to have been raised by the parties.

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[195]State Bd. of Tax Comm'rs v. Valparaiso Golf Club, 330 N.E.2d 394 (Ind. Ct. App. 1975).

[196]Indiana State Bd. of Tax Comm'rs v. Pappas, 302 N.E.2d 858 (Ind. Ct. App. 1973).

[197]*Id.*

[198]*Id.* at 864.

[199]IND. CODE § 6-1-33-3 (Burns 1972) (current version at *id.* § 6-1.1-31-6 (Burns Supp. 1976) as set forth in note 203 *infra*); *id.* § 6-1-1-17 (Burns 1972) (current version at *id.* §§ 6-1.1-31-1, -2 (Burns Supp. 1976)); *id.* § 6-1-33-2 (Burns 1972) (current version at *id.* § 6-1.1-31-5 (Burns Supp. 1976)).

[200]302 N.E.2d at 864.

Until the question is raised, however, *Pappas* will stand for the proposition that where the property assessed is of a type contemplated by the then current assessment manual, the only substantive basis for appeal of the amount of the assessment must involve an allegation of improper application of such manual.

In the more recent case, *State Board of Tax Commissioners v. Valparaiso Golf Club*,[201] several of the issues in *Pappas* were also raised. As in *Pappas*, the complainant in *Valparaiso* had exhausted its administrative remedies[202] in an effort to reduce the amount of the assessment on its property in question, a golf course. The superior court found that the Board had not properly considered all of the statutory elements[203] and remanded the case to the Board for

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[201]330 N.E.2d 394 (Ind. Ct. App. 1975).

[202]Complainant had already appealed to the county board of review, the Board, and the superior court.

[203]IND. CODE §§ 6-1-22-1 to -8 (Burns 1972) (current version at *id.* §§ 6-1.1-31-1 to -8 (Burns Supp. 1976)), in particular *id.* § 6-1-33-3 (Burns 1972) (current version at *id.* § 6-1.1-31-6 (Burns Supp. 1976)), which was quoted by the court as follows:

> For the purpose of securing a just valuation for the taxation of real property, the rules, regulations, standards and conversion tables adopted by the state board of tax commissioners shall provide for the classification of lands on the basis of acreage, lots, size, location, use, productivity or earning capacity, applicable zoning provisions, accessibility to highways, sewers and other public services and advantages, and such other bases as may be just and proper; . . . The rules, regulations and standards shall set forth the methods and instructions for determining the following:
>
> (a) The proper classification of lands and improvements;
>
> (b) The size thereof;
>
> (c) The effect of location and use on value;
>
> (d) The depreciation, including physical deterioration, or functional, economic or social obsolescence;
>
> (e) The cost of reproduction of improvement;
>
> (f) The productivity or earning capacity;
>
> (g) The capitalization of income;
>
> (h) The valuation of lands and improvements on the basis of the foregoing elements and such other elements as may be just and proper.

330 N.E.2d at 395-96.

The above statute was expanded in scope by Pub. L. No. 47, § 1, 1975 Ind. Acts, codified as IND. CODE § 6-1.1-31-6 (Burns Supp. 1976): Bases for classification of real property—Instructions for assessment.—

> (a) With respect to the assessment of real property, the rules and regulations of the state board of tax commissioners shall provide for:
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> (1) the classification of land on the basis of:
>
> (i) acreage;
>
> (ii) lots;
>
> (iii) size;
>
> (iv) location;
>
> (v) use;
>
> (vi) productivity or earning capacity;

reassessment. However, in its findings of facts, the superior court also found that the land was worth the same as surrounding land on an acreage basis, plus an amount equal to $1,500 per green. On appeal by the Board, the court of appeals concurred in setting aside the Board's assessment but also eliminated the findings of the superior court concerning the value of the land and greens. In setting aside the assessment, two facts carried great weight with the court. First, it had been conceded at the trial "that the appraisal manual contains no rules, regulations or standards applicable to the appraisal of golf courses."[204] Second, "at the trial, the witnesses for the Board specifically testified that use was the only factor they considered or used in fixing the valuation."[205] The court then concluded that the 1968 Appraisal Manual, as prepared by the Board, did not fully embrace the statutes[206] and that the assessment had not been conducted in accordance with the requirement of the statute, namely, "that all assessments shall be on the basis of just valuations *taking*

(vii) applicable zoning provisions;
(viii) accessibility to highways, sewers, and other public services or facilities; and
(ix) any other factor which is just and proper.
(2) the classification of improvements on the basis of:
(i) size;
(ii) location;
(iii) use;
(iv) type and character of consteruction [*sic*];
(v) age;
(vi) condition;
(vii) cost of reproduction; and
(viii) any other factor which is just and proper.
(b) With respect to the assessment of real property, the rules and regulations of the state board of tax commissioners shall include instructions for determining:
(1) the proper classification of real property;
(2) the size of real property;
(3) the effects that location and use have on the value of real property;
(4) the depreciation, including physical deterioration and obsolescence, of real property;
(5) the cost of reproducing improvements;
(6) the productivity or earning capacity of real property;
(7) the capitalization of income received from the use of real property; and
(8) the true cash value of real property based on the factors listed in this subsection and any other just and proper factors.

The Indiana General Assembly seems, therefore, to have adopted standards which might tend to result in appraisals or assessments which more nearly approximate market value than those of the past.

[204]330 N.E.2d at 396.

[205]*Id.*

[206]*Id.*

into consideration all of the elements referred to in this article, [6-1-33-1—6-1-33-8], insofar as the same may be applicable."[207] Thus, to the extent that a complainant can show that the then current manual does not set forth *proper* criteria for the assessment of his real property, *Valparaiso* would appear to have overruled the narrow holding of *Pappas*, which would otherwise have allowed any manual to stand unquestioned. By allowing other information to be brought to bear on the assessment problem than is set forth in the 1968 Appraisal Manual, the court, in *Valparaiso*, may also have avoided the potential issue of unconstitutional delegation of assessing authority, namely, the power to define "assessed value," from the Indiana General Assembly to the Board. In fact, it is possible to construe the holding in *Valparaiso* as being in direct conflict with the section of the tax laws which declares that the Board has the power to define true cash value.[208]

The *Valparaiso* holding should not be distinguished on its facts from *Pappas* simply because of the lack of rules in the 1968 Appraisal Manual for the assessment of golf courses, for such fact is irrelevant. Rather, the rule announced in *Valparaiso* is contrary to the *Pappas* rule because the Board is *now* required to *always* consider *each* of the guidelines set forth by the legislature *and utilize all those applicable* to the property being assessed.

5. Effect of Omitting Classes of Property from the Regulations

It will be observed that, when the division of an assessment of a condominium project is made on the basis of the percentages of undivided interest, some of the taxpayers will have been assessed for property they do not own and other taxpayers will not have been assessed for as much property as they own. Thus, as to those units which have been under-assessed it is possible to assert that such property as was not included within their respective parcels was "omitted."[209] The courts of Indiana have dealt at some length with the effect of omitting whole classes of property and have reached the conclusion that insofar as the regulations of the Board fail to prescribe standards by which such property may be assessed the Board is deemed to have elected to not impose the ad valorem tax on such property.[210] Based on such authority it might be possible to

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[207]*Id.* at 395, *quoting* IND. CODE § 6-1-33-2 (Burns 1972) (current version at *id.* § 6-1.1-31-5 (Burns Supp. 1976)) (emphasis by the court).

[208]IND. CODE § 6-1.1-31-5(a) (Burns Supp. 1976).

[209]*Id.* §§ 6-1.1-1-6, -9-1, -13-3.

[210]*See* State Bd. of Tax Comm'rs v. Holliday, 150 Ind. 216, 49 N.E. 14 (1898), a case involving the taxation of insurance policies, wherein the supreme court held that,

assert that the failure of the Board to provide standards by which it is possible to divide the assessments of condominium projects into separate parcels is such a serious defect as to fail to create any liability for property taxes on the part of the affected coowners. More likely, an appeal of the allocation of a condominium project into separate parcels on the ground that the manual contained no rules for such allocation would probably have the effect of voiding the assessment on the entire project.

6. Effect of Easements and Covenants on Definition of "Apartment" for Assessment Purposes

The Board treats condominiums and townhouses differently for purposes of allocating the total assessed value of the project to the respective units.[211] The assessment method currently used on condominiums assumes that the value of the respective interests of the coowners in their *dwelling units* is identical to the percentages of undivided interest in the *common property*, as set forth in the declaration. This is often not the case[212] and should therefore not be used for assessment purposes. Much of the conceptual difficulty in assuming a separation of the fee simple dwelling unit, as defined in the HPA,[213] from its surrounding common property[214] stems from the fact that without the surrounding common property the value of the "enclosed space" owned in fee simple would be zero. Obviously, without support, protection, utilities, and access, an "enclosed space" is useless. Unfortunately, the 1968 Appraisal Manual sets forth no comprehensive manner of assessing real property other than on a "physical" basis,[215] thus forcing the assessing official to equate the required ownership separation with an impracticable physical separation.

The Board is presented with a dilemma when forced to assess condominium units as separate parcels: on the one hand, the extent of

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because (1) the taxing power was inherent in the legislature, (2) art. 10, § 1 of the Indiana Constitution was a limitation on the taxing power, (3) said power was limited to merely prescribing permitted rules and regulations, and (4) the legislature had failed to provide for taxation regulations for insurance policies, no other department could provide such regulations and insurance policies were deemed exempt from ad valorem taxation. State *ex rel.* Lewis v. Smith, 158 Ind. 543, 63 N.E. 25, 214 (1902) (dissenting opinion) (amount of mortgage lien should be subtracted from assessed value for tax purposes); Riley v. Western Union Tel. Co., 47 Ind. 511 (1874) (poles and wires of an out-of-state telegraph corporation not taxable).

[211] *See* Exhibits C, D and E *infra* and text accompanying notes 142-45.

[212] *Id.*

[213] IND. CODE § 32-1-6-2(a) (Burns 1973), as set forth in note 20 *supra.*

[214] *Id.* § 32-1-6-2(f), as set forth in note 12 *supra.*

[215] See discussion at notes 188-91 *supra.*

the ownership of the fee simple estate is only to the inside faces of the surrounding walls; yet, on the other hand, the 1968 Appraisal Manual provides cost factors and guidance only for assessing buildings as a whole. If it is practically impossible to determine the cost or value of only the interior part of a physical structure in the *absence* of the surrounding exterior then the Board should consider ways in which the legal estates may be separated. An ideal solution to this dilemma would be achieved if the assessing officials were to assess condominiums in a manner similar to townhouses, for such assessments would be both easily understood by the coowners and ascertainable by use of the 1968 Appraisal Manual with but few modifications.

There are several alternative legal theories available by which the assessing official may view condominium projects in a manner similar to townhouse projects. Each theory relies upon acceptance of the basic proposition that every condominium coowner demands, expects and enjoys the exclusive *use* of some parts of the common property which, by definition, lay outside of the fee simple portion of the property. Examples of such exclusive uses abound in low-rise condominiums: roofs, exterior walls, foundations, land under the unit, garages, patios, walkways, air-conditioning compressors and buried utility connections. While multi-story construction does not offer such simple examples of exclusive use of common property, these buildings are even more difficult to assess if it is necessary to assume a physical separation instead of a legal separation.

The first legal theory which may be used by the Board is to assume that each coowner has such *easements* in the common property over which he has exclusive or near-exclusive use as to confer on him a quasi-fee simple estate in such common property, and that such quasi-fee simple estate is substantial enough to cause the coowner to incur the tax liability for such common property. Such easements might be assumed to rest on one or more of three bases. The first basis might be the familiar easement by necessity, whereby one owner is allowed an easement on the property of another where there was an original unity of ownership, an actual necessity for the easement, and an original intent of the parties that the easement should exist.[216] In condominiums, of course, the nature of the use of some parts of the common property by the coowners exceeds the degree of need typically required to create the easement by necessity for, in such cases, the use is *totally* exclusive of the other coowners. The second basis for finding easements in the common property might be the implied reciprocal easement.[217] This theory is typically

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[216]See 3 POWELL, *supra* note 57, ¶ 410 (1977), and authorities cited therein.
[217]*Id.* ¶ 411.

employed by the courts where two or more parties share a party wall without an agreement with respect to their respective rights and duties for support and maintenance. Such theory would be particularly applicable to high-rise condominiums with respect to the maintenance of the semi-public passageways and interior supportive parts of the building. The third basis for finding easements in common property in favor of the coowners might involve judicially created easements.[218] These easements typically arise when an owner of a servient tenement attempts to obtain an injunction to prevent the use of an area by the dominant tenement and fails to do so. In this manner, the court will have made it impossible to remove the dominant tenement or his use of the servient tenement and in effect will have created an easement. Such an easement might occur in condominiums when the coowners' association sues to prevent the enclosure and exclusive use by one coowner of a part of the common yard area but the court allows such enclosure and use. Note the similarity between the above example and the rights of the parties to the use of limited common area.[219] The assessing official should not be unmindful of the importance and value of these forms of use to the coowners of condominiums.

The combination of exclusive use by one coowner and the inability to separate the physical property into viable parcels due to the statutory requirement that the common property never be separated from the fee simple estate[220] leads to a second theory by which the assessing official might assess condominiums. The theory here is that the *use* by the coowners of certain parts of the common property, as per the HPA, the declaration and physical construction, is such that it might be *executed* into fee simple title by the Statute of Uses.[221] While it is not true that the HPA was intended to create the types of unacceptable practices which caused the passage of the Statute of Uses, nevertheless, if the recommendations for the above modifi-

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[218] *Id.* ¶ 412.

[219] IND. CODE § 32-1-6-2(j) (Burns 1973) provides: " 'Limited common areas and facilities' means and includes those common areas and facilities designated in the declaration as reserved for use of certain apartment or apartments to the exclusion of the other apartments."

[220] *Id.* § 32-1-6-7(b).

[221] *Id.* § 30-4-2-9 (Burns 1972) provides: "Necessity of powers or duties.—Subject to IC 30-4-2-13, if the trustee has neither a power nor duty related to the administration of the trust, the title to the trust property will be treated as having vested directly in the beneficiary on the date of delivery to the trustee." *Id.* § 30-4-2-13 sets forth when the Statute of Uses does not apply to naked trusts. *See* Elliott v. Travelers Ins. Co., 121 Ind. App. 400, 90 N.E.2d 274 (1951) (execution under the statute); Nelson v. Davis, 35 Ind. 474 (1871) (adoption of the English Statute of Uses, 27 Henry VIII, into the Indiana common law).

cations of the termination provisions of the HPA are enacted, the rights of the coowners in those parts of the common property used exclusively by other coowners will have been reduced to little more than naked legal title and the Statute of Uses might apply. When a party, other than a trustee, holds no more than legal title to property used entirely by another, there should be no reason to prevent the operation of the Statute of Uses for the limited purpose of real property taxation and assess the property as though all of the common property under such exclusive use were owned in fee simple by the user, assuming that such assessment is convenient for the Board and not objectionable to the coowner.

The property tax law provides a third theory upon which the assessing official may assess parts of the common property as though they were owned in fee simple by the exclusive user. Under such laws there are two cases where the owner of real property for purposes of taxation thereon may be a person other than the holder of the legal title: first, when the property is mortgaged, a mortgagee in possession is deemed to be the taxable owner;[222] and, second, a life tenant in possession is deemed to be the taxable owner.[223] Clearly, both of these exceptions to the legal title doctrine[224] involve the element of exclusive use by the outside party and are justified because such exclusive use temporarily confers the totality of benefits of ownership of the premises upon such user, including such benefits as are available from the government which levies the taxes. Although it is quite possible that those two exceptions were created in order to simplify the collection of taxes, the fact is that the law does not compel the taxing authorities always to seek the legal title holder for payment of real property taxes.

D. Summary

The following suggestions for adjustments in the property tax laws are based on the above discussion and are in addition to the suggestions contained in the section concerning the HPA.

1. "True Cash Value" Should Be Defined as "Fair Market Value"

Too much emphasis is currently placed on equating reproduction cost to "assessed value" in the 1968 and 1976 Appraisal Manuals.[225] To

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[222]IND. CODE § 6-1.1-1-9(d) (Burns Supp. 1976), as set forth in note 146 *supra.*

[223]*Id.* § 6-1.1-1-9(f), as set forth in note 146 *supra.*

[224]*Id.* § 6-1.1-1-9(b) and (c), as set forth in note 146 *supra; see* authorities also cited therein.

[225]See discussion at notes 188-92 *supra.*

achieve the constitutional goal of uniformity and equality[226] and to protect the Board from continued litigation on the question of accurate use of such assessment manuals, the Indiana General Assembly should define "true cash value" as "market value." In addition, the Indiana General Assembly should prescribe to the Board that its rules and regulations should be intended to achieve "market value." The Indiana General Assembly is free, of course, to set forth the *extent* to which each approach to value should be considered before an assessment will be deemed to have been prepared in conformance with the statute.

2. Land Value Changes

The Indiana General Assembly or the Board should provide that when land undergoes a change in use or zoning, followed by a reassessment as of the following March 1st[227] based upon change in value caused thereby, the value placed upon the land should be that which the land would have had if the change and reassessment had occurred on the date of the last general reassessment of all real property, or the date being used by the Board for assessing improvements, whichever is then applicable.

3. Amendment of Regulations

The issues raised in condominium and townhouse assessment and *Valparaiso*[228] indicate that the Indiana General Assembly should anticipate that there will be assessment problems of a minor nature which will require swift action by the Board. The 1968 Appraisal Manual has not been modified *in part* since its promulgation in 1968.[229] The Indiana General Assembly should consider ways in which the Board may be more flexible in order to meet unanticipated situations.

4. Assessment of Condominiums and Townhouses as Separate Parcels

One suggested standard method for assessing condominiums[230] bears much resemblance to the method now used by the Board for the assessment of townhouse improvements.[231] Each condominium unit

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[226]IND. CONST. art. 10, § 1.

[227]IND. CODE § 6-1.1-1-2 (Burns Supp. 1976).

[228]330 N.E.2d 395 (Ind. Ct. App. 1975).

[229]The complete revision of the 1968 Appraisal Manual by promulgation of a revision to Regulation No. 17 in 1976-1977, the 1976 Appraisal Manual, is the first and only modification of the 1968 Appraisal Manual, despite the passage of Pub. L. No. 47, § 1, 1975 Ind. Acts 247, the complete revision of the property tax laws.

[230]*See* Exhibit F *infra.*

[231]*See* Exhibit C *infra.*

is assumed to be legally separable from the others for assessment purposes. All condominium common property which is subject to exclusive use by the respective coowner is included in his assessment as though owned in fee, with the exception of the land. The fact that some walls are common walls with other units is taken into consideration by the use of the Apartment Pricing Schedule.[232] Land and such other common property as is shared by all of the coowners is allocated to the units according to their respective percentages of undivided interest. Thus, this method allocates common property to those units which have its exclusive use, independent of the legal title,and allocates those portions of the common property which are not subject to exclusive use by one coowner according to the legal title. Use of this method for purposes of assessing real property may be based upon the three theories discussed at length above: the legal fiction of easements over commonly owned property,[233] the legal fiction of an execution of "uses" into fee simple title under the Statute of Uses,[234] and an extension of the two statutory exceptions to the otherwise strict requirement that the taxes should be paid by the legal title holder.[235] Unfortunately, although this suggested method would allow the assessing official to uniformly assess condominiums by using the 1968 Appraisal Manual, the resulting assessment would still lack the validity which could be generated by proper use of the market data approach to value.[236] This defect in validity is, however, inherent in many other property assessments and is not correctable without a change in direction from the Board, support from the Indiana General Assembly and the courts and dedication by the county and township assessing officials to such change in direction.

IV. Conclusion

In comparison with more traditional forms of housing, condominiums are quite new to Indiana. As a result, many serious problems involving internal operations and termination of condominium projects have not yet been experienced by the citizens of Indiana. On the other hand, real property taxation is one of the oldest forms of taxation, and it is clear that such tax laws create several unique problems when applied to condominiums. The above suggestions are intended to aid in legislative and administrative solutions to such problems before needless financial hardship is incurred by Indiana condominium owners.

Philip C. Thrasher

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[232]*See* Exhibit A *infra* and note 143 *supra.*
[233]See text accompanying notes 216-19 *supra.*
[234]See text accompanying notes 220-21 *supra.*
[235]See text accompanying notes 222-24 *supra.*
[236]See discussion in note 187 *supra.*

EXHIBIT A

APARTMENT PRICING SCHEDULE

WOOD JOISTS					FIRE RESISTANT			REINFORCED CONCRETE			QUALITY		
	BRICK		FRAME									+50	338
Unit Area	First Flr.	Upper Flr.	First Flr.	Upper Flr.	Unit Area	First Flr.	Upper Flr.	Unit Area	First Flr.	Upper Flr.		+25	281
												+10	248
300	12.35	11.70	11.75	11.10	300	13.60	12.90	300	14.20	13.45	AA		225
350	11.55	10.90	10.95	10.35	350	12.65	11.95	350	13.25	12.50		+40	210
400	10.85	10.20	10.30	9.70	400	11.90	11.20	400	12.45	11.70		+30	195
450	10.25	9.60	9.75	9.10	450	11.25	10.55	450	11.75	11.05		+20	180
500	9.75	9.10	9.25	8.65	500	10.70	10.00	500	11.20	10.45		+10	165
												+5	158
550	9.30	8.65	8.80	8.25	550	10.25	9.55	550	10.70	9.95	A		150
600	8.95	8.30	8.50	7.85	600	9.85	9.10	600	10.30	9.55		−5	143
650	8.60	7.95	8.15	7.60	650	9.45	8.75	650	9.90	9.15		±10	135
700	8.35	7.70	7.90	7.30	700	9.15	8.45	700	9.60	8.80		+5	128
750	8.10	7.45	7.75	7.10	750	8.90	8.25	750	9.30	8.55	B		122
800	7.90	7.25	7.50	6.85	800	8.70	7.95	800	9.10	8.35		−5	116
850	7.75	7.10	7.35	6.70	850	8.50	7.80	850	8.90	8.15		±10	110
900	7.60	6.90	7.20	6.60	900	8.35	7.65	900	8.70	7.95		+5	105
950	7.40	6.75	7.05	6.45	950	8.15	7.40	950	8.55	7.80	C		100
1000	7.30	6.60	6.95	6.30	1000	7.95	7.25	1000	8.35	7.60		−5	95
1050	7.15	6.50	6.80	6.15	1050	7.85	7.15	1050	8.25	7.45		±10	90
1100	7.05	6.40	6.70	6.05	1100	7.75	7.05	1100	8.10	7.35		+5	86
1150	7.00	6.35	6.65	6.00	1150	7.70	7.00	1150	8.00	7.25	D		82
1200	6.90	6.30	6.60	5.95	1200	7.65	6.95	1200	7.95	7.20		−5	78
1250	6.85	6.25	6.55	5.90	1250	7.60	6.90	1250	7.90	7.15		−10	74
												−20	66
1300	6.80	6.15	6.50	5.85	1300	7.50	6.80	1300	7.85	7.10		−30	57
1350	6.75	6.10	6.45	5.80	1350	7.45	6.75	1350	7.80	7.05	E		50
1400	6.70	6.05	6.40	5.75	1400	7.40	6.70	1400	7.75	7.00		−10	45
1450	6.65	6.00	6.35	5.70	1450	7.35	6.65	1450	7.70	6.95		−20	40
1500	6.60	5.95	6.30	5.65	1500	7.30	6.60	1500	7.65	6.90		−30	35
												−40	30
Over	6.50	5.85	6.20	5.55	Over	7.20	6.50	Over	7.55	6.80		−50	25

To obtain average unit area divide total finished areas of all floors by the number of apartment units. (High rise structures: the first floor may house a small lobby, and the balance devoted to commercial use. In this situation the first floor area should not be used in computing the average unit area and an appropriate square foot rate should be selected from the commercial schedule.)

UNFINISHED BASEMENT:

Wood joist buildings	Use 2.70 S/F
Fire resistant buildings	Use 3.80 S/F
Reinforced concrete buildings	Use 4.30 S/F

FINISHED BASEMENT: Use upper floor square foot price.

HEIGHT ADJUSTMENT: Add 1% to total base price for each floor above three stories.

PLUMBING: Base price includes standard plumbing for each unit. Add $200.00 for each additional fixture.

AIR CONDITIONING:

Central system add	.50 S/F Per Floor or
Efficiency Units	350 Per Unit
1 Bedroom Units	400 Per Unit
2 Bedroom Units	500 Per Unit
3 Bedroom Units	600 Per Unit

Window or wall type package units are Personal Property

ELEVATORS: Use elevator schedule and convert price to square foot of building area.

MINOR ADDITIONS: Price from dwelling schedule.

TOWNHOUSE (ROW TYPE) APTS: Add 10% to unit base price for *end units only*.

EXHIBIT B
HYPOTHETICAL APARTMENT BUILDING ASSESSMENT

Description: Unit A: 500 sq. ft., one bath, one story, end unit, all frame (no brick).
Unit B: 1,000 sq. ft., 1½ bath, one story, inside unit, half brick, 150 sq. ft. patio.
Unit C: 1,500 sq. ft., two baths, two story, inside unit, 25% brick, 150 sq. ft. patio, inside fireplace.
Unit D: 2,000 sq. ft., two bath, laundry room, two story, end unit, 100% brick, 150 sq. ft. patio, inside fireplace.

Building is 100% air conditioned, somewhat better than average quality, design is ten percent better than average, no depreciation (new building), no functional or economic obsolescence.
Land is one acre, including playground area.
Parking is on adjacent dedicated street.
Assessment: Average Unit Size = 5,000 sq. ft. ÷ 4 units = 1,250 sq. ft.
Average Brick estimated at 50%.

	1st	2nd	Total
Rate for 1st floor	$6.70		
Rate for 2nd floor		$6.08	
Air-Conditioning	0.50	0.50	
Total Rates	$7.20	$6.58	
Sq. Ft. per floor	X3,250	X1,750	5,000
Subtotal	$23,400	$11,515	$34,915
Additions: Plumbing (9 extra fixt. @ $200)			1,800
Patios (3 @ 150 sq. ft. X $0.60/sq. ft.)			270
Fireplaces (2 @ $1,000)			2,000
End Unit Factor (10% + 10% = 20%, ÷ 4 units = 5%, X $34,915)			1,746
Total Base			$40,731
Grade Factor for higher quality (C + 10 = 110%)			X1.10
			$44,804
Cost and Design Factor			X1.10
Total for Improvements			$49,284
			÷ 3
Assessed Value, Improvements, say			$16,430
Land Value @ $10,000/acre			$10,000
			÷ 3
Assessed Value, Land say			$3,330
Total Assessed Value			$19,760

EXHIBIT C

HYPOTHETICAL ASSESSMENT OF TOWNHOUSE

Description: Same as in Exhibit B. Land is sold as 4 equal lots of 1/5 acre each. Common Property consists of 1/5 acre with playground.

	Tax Parcels				
	Unit A	Unit B	Unit C	Unit D	Assoc.
Rate for 1st floor[1]	$9.25	$7.18	$6.40	$6.50	—
Rate for 2nd floor[1]	—	—	$5.75	$6.20	—
Air-Conditioning	$0.50	$0.50	$1.00	$1.00	—
Total Rate	$9.75	$7.68	$13.15	$13.70	—
Times: Sq. Ft. per floor	X500	X1000	X750	X1000	—
Subtotal	$4,875.	$7,680.	$9,863.	$13,700.	—
Additions: Patios (150 sq. ft. X $0.60)	—	90	90	90	—
Plumbing, $200/ extra fixt.	—	400	600	800	—
Fireplace, good quality	—	—	1000	1000	—
End Unit Factor (10% + 10% = 20%, ÷ 4 units = 5%, X Subtotal above)	244[2]	384[2]	493[2]	685[2]	—
Total Base	$5,119	$8,554	$12,046	$16,275	—
Grade Factor	X 1.10	X 1.10	X 1.10	X 1.10	
	$5,631	$9,409	$13,251	$17,903	—
Cost and Design Factor	X 1.10	X 1.10	X 1.10	X 1.10	
Total Value, Improvements	$6,194	$10,350	$14,576	$19,693	—
	÷ 3	÷ 3	÷ 3	÷ 3	
Assessed Value, Improvements	2,060	3,450	4,860	6,560	
Common Property (Land)	2,000	2,000	2,000	2,000	$2,000
Assessed Value, Land	670	670	670	670	670
Total Assessed Value (rounded)	$2,730	$4,120	$5,530	$7,230	$670

Grand Total Assessed Value: $20,280

[1]Square foot cost factors are selected on a per unit basis, rather than a per building basis.
[2]End Unit Additions would more properly be applied to Units A & D only, not allocated to Units B and C.

EXHIBIT D

HYPOTHETICAL ASSESSMENT OF CONDOMINIUM USING PERCENTAGE INTEREST FOR ALLOCATION

Description: Same as in Exhibit B. All land is owned in common. Each unit has 25 percent undivided interest in common property.

Total Assessed Value from Exhibit B $19,760

Assessed Value for each unit found by multiplying Total Assessed Value for the property by the respective percentage of undivided interest.

	Unit A	Unit B	Unit C	Unit D
Total Assessed Value	$19,760	$19,760	$19,760	$19,760
Percentage of Undivided Interest	X .25	X .25	X .25	X .25
Assessed Value per Unit	$4,940	$4,940	$4,940	$4,940

Total Assessed Values of all units: $19,760

EXHIBIT E

HYPOTHETICAL ASSESSMENT OF CONDOMINIUM DEDUCTING FIFTY PERCENT FEE BEFORE ALLOCATION

Description: Same as Exhibit B. Ownership and percentages of undivided interest the same as Exhibit D.

In these cases the value of the units is split evenly, half being assigned to the fee simple portion and half being allocated to common property:

	Unit A	Unit B	Unit C	Unit D	Common
Total Value, Improvements from Exhibit C	$6,194	$10,350	$14,576	$19,693	—
Allocation of half to Common Property	(3,097)	(5,175)	(7,288)	(9,846)	$25,406
Adjusted Total for Improvements	$3,097	$5,175	$7,288	$9,847	$25,406
Other Common Property					$10,000
Total Common Property					$35,406
Allocation of All Common Property to Units per Percentage Interest	$8,851	$8,852	$8,851	$8,852	(35,406)[1]
Total Valuation	$11,948 ÷ 3	$14,027 ÷ 3	$16,139 ÷ 3	$18,699 ÷ 3	
Total Assessed Value (rounded)	$3,980	$4,680	$5,380	$6,230	

Total Assessed Value of All Units: $20,270

[1]All Common Property is, of course, allocated to the Units.

EXHIBIT F

SUGGESTED STANDARD CONDOMINIUM ASSESSMENT

Description: Same as in Exhibit B. Ownership and percentage of undivided interest the same as in Exhibits D and E.

	Tax Parcels			
	Unit A	Unit B	Unit C	Unit D
[1]Rate for First Floor	$9.25	$7.18	$6.40[2]	$6.50
[1]Rate for Second Floor	—	—	$5.75	$6.20
Air Conditioning	$0.50	$0.50	$1.00[2]	$1.00
Total Rate	$9.75	$7.68	$13.15	$13.70
Times: Sq. Ft. per Floor	X 500	X1000	X 750	X1000
Sub Total	$4,875	$7,680	$9,863	$13,700
End Unit Factor[3]	488	—	—	1,370
Plumbing, $200/fixt.	—	400	600	800
Patio, 150 sq. ft. ea.[4]	—	90	90	90
Fireplace, good quality	—	—	1000	1000
Total Base	$5,363	$8,170	$11,553	$16,960
Grade Factor	X 1.10	X 1.10	X 1.10	X 1.10
	$5,899	$8,987	$12,708	$18,656
Cost and Design Factor	X 1.10	X 1.10	X 1.10	X 1.10
Total for Improvements	$6,489	$9,886	$13,979	$20,522
Add: Balance of Unassigned Common Property Allocated per Percentage Interest	2,500	2,500	2.500	2,500
Total Valuation	$8,989	$12,386	$16,479	$23,022
	÷ 3	÷ 3	÷ 3	÷ 3
Assessed Value (rounded)	$3,000	$4,130	$5,490	$7,670
Total Assessed Value of All Units:	$20,290[5]			

[1]Rate used was interpolated between Brick and Frame rates in the manual, based on percent of Brick and actual square feet per unit.
[2]If Unit C were all on the second floor, there would be no rate for the first floor and the air-conditioning factor would be $0.50 (one floor only).
[3]End Unit factor assigned to end units only.
[4]Patios are Limited Common Area, assigned to units having exclusive possessory interest.
[5]Difference from Exhibit B is in allocation of End Unit Factor.

Recent Development

CRIMINAL PROCEDURE—PROBABLE CAUSE—Entrapment standard of probable cause to suspect is rejected in favor of a subjective approach which focuses upon the predispositon to commit.—*Hardin v. State*, 358 N.E.2d 134 (Ind. 1976).

The genesis of entrapment probable cause is found in a holding of the Indiana Supreme Court in which the court stated that when the defense of entrapment is evoked, the burden is placed upon the state "of proving that it had probable cause of suspecting that the appellant was engaged in illegal conduct."[1] Re-examining the area of entrapment defense, the court, in *Hardin v. State*,[2] concluded that the procedural standard of probable cause to suspect[3] "has proven more difficult in its application than originally believed and no longer should be an additional burden upon law enforcement officials as they combat the trafficking in drugs."[4] Analyzing the problems with Indiana's previous entrapment standard of proof, the Indiana Supreme Court determined that courts, even while requiring proof of probable cause to suspect, have also considered the accused's predisposition to commit the crime with which he is charged. Focusing upon this latter consideration, the court enunciated a two-part inquiry which it deems appropriate when the defense of entrapment is raised: "(1) Did police officers or their informants initiate and actively participate in the criminal activity; and (2) [I]s there evidence that the accused was predisposed to commit the crime so that the proscribed activity was not solely the idea of the police officials?"[5]

Hardin thus moves from the "objective" approach to the "subjective" approach regarding entrapment. The defense of entrapment is available in Indiana to an accused who has been instigated, induced, or lured to commit a crime which he had no independent intention or desire to commit, and who is thereafter prosecuted for that crime.[6]

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[1]Walker v. State, 255 Ind. 65, 71, 262 N.E.2d 641, 645 (1970).

[2]358 N.E.2d 134 (Ind. 1976).

[3]Probable cause to suspect that the accused was engaged in illegal conduct and was already predisposed to commit the crime. *See* Smith v. State, 258 Ind. 415, 281 N.E.2d 803 (1972); Walker v. State, 255 Ind. 65, 262 N.E.2d 641 (1970).

[4]358 N.E.2d at 135.

[5]*Id.* at 136.

[6]Minton v. State, 247 Ind. 307, 214 N.E.2d 380 (1966); Fischer v. State, 312 N.E.2d 904 (Ind. Ct. App. 1974); May v. State, 154 Ind. App. 75, 289 N.E.2d 135 (1972).

This understanding of what constitutes entrapment is consonant with the "subjective approach" to the defense of entrapment which was discussed by the United States Supreme Court in *United States v. Russell.*[7]

Under the subjective approach, the intent of the accused is dispositive. Sound public policy estops the state from prosecuting an accused when the criminal design is formulated not in the mind of the accused but in the mind of government officials.[8] The defense of entrapment provides a means of distinguishing between trapping the unwary innocent and trapping the unwary criminal. When the state, through deception, implants criminal intent in the mind of an otherwise innocent individual, the defense of entrapment should be raised.[9] Once the defense is raised, however, the standard of proof imposed upon the state differs according to the approach, objective or subjective, followed in the jurisdiction in which the crime was committed.

Indiana has, in the past, incorporated certain aspects of the "objective approach."[10] The effect of placing a focus upon the probable cause to suspect was to impose a heavy burden upon the state. If probable cause for "baiting the trap" is not present, the "work product" or evidence obtained by the police cannot be utilized.[11] The court in *Smith* wrote that the probable cause component "furthers the public interest, . . . is simple in its requirements and application and its rigid enforcement would not thwart the reasonable and logical efforts of law enforcement officers."[12] Yet, five years later the Indiana Supreme Court has doubled back, concluding in *Hardin* that the standard is difficult to apply.[13]

A real question could be raised as to whether *Hardin* does represent a departure from previous Indiana judicial holdings, or whether *Hardin* merely educes the purified "subjective approach" as a result of evolutionary process. Several judicial opinions handed down during 1976 indicate that Indiana's move toward the holding in

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[7]411 U.S. 423 (1973). *See also* Sherman v. United States, 356 U.S. 369 (1958); Sorrells v. United States, 287 U.S. 435 (1932).

[8]Sorrells v. United States, 287 U.S. at 445, *cited in* Gray v. State, 249 Ind. 629, 633, 231 N.E.2d 793, 796 (1967).

[9]United States v. Russell, 411 U.S. at 436.

[10]The "objective approach," focusing upon police conduct, has been discussed in the dissenting opinions of United States v. Russell, 411 U.S. at 436-39 (Douglas, J.), 439-50 (Stewart, J.), and concurring opinion of Sherman v. United States, 356 U.S. at 378-88 (Frankfurter, J.).

[11]Smith v. State, 258 Ind. 415, 281 N.E.2d 803 (1972).

[12]*Id.* at 419, 281 N.E.2d at 806.

[13]358 N.E.2d at 135.

Hardin was more gradual than the citations in the *Hardin* decision would admit. *Thomas v. State*[14] established that if the police do not initiate a transaction against any particular suspect, the requirement that probable cause must be proven should be considered *in conjunction with* the defendant's predisposition to commit the crime charged.

The Indiana Supreme Court in *Thomas* did not patently abolish the probable cause to suspect rule, but the latent effect was to severely cripple it. *Thomas* suggested that probable cause to suspect a defendant of illegal activity is irrelevant where the defendant, caught in a transaction initiated by the State, has the predisposition to commit the crime charged.[15] In both *Shipp v. State*[16] and *Riding v. State*,[17] the probable cause requirement was not termed irrelevant, but each case was affirmed on the grounds that the state *had probable cause to suspect* the defendant *because the evidence showed a predisposition* to commit the crime. This melding of the two separate requirements provides some judicial history for the *Hardin* decision. Thus, *Hardin* may have pulled the chair from under the entrapment probable cause rule, but it can be argued that the rule was already balancing on one leg.

Moreover, as the supreme court points out in *Hardin*, there is legislative guidance on the subject of entrapment. Indiana's new Penal Code, which becomes effective July 1, 1977, establishes the same criteria for an entrapment defense as were spelled out in *Hardin*.[18] Justice Hunter, writing the majority opinion in *Hardin*, acknowledged the fact that "courts in Indiana have directed the second portion of their inquiry to the accused's predisposition to commit the crime with which he is charged."[19] The majority coupled this direction with "the legislative choice of the subjective approach" and

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[14]345 N.E.2d 835 (Ind. 1976).

[15]*Id.* at 837.

[16]350 N.E.2d 619 (Ind. 1976).

[17]350 N.E.2d 629 (Ind. 1976).

[18]IND. CODE § 35-41-3-9 (Burns Supp. 1976) provides in pertinent part:

(a) It is a defense that:

(1) the prohibited conduct of the person was the product of a public servant using persuasion or other means likely to cause the person to engage in the conduct; and

(2) the person was not predisposed to commit the offense.

(b) Conduct merely affording a person an opportunity to commit the offense does not constitute entrapment.

For a discussion of this section, see Kerr, *Foreword: Indiana's Bicentennial Criminal Code, 1976 Survey of Recent Developments in Indiana Law*, 10 IND. L. REV. 1, 8-9 (1976).

[19]358 N.E.2d at 136.

adopted the majority view of *Sorrells v. United States*[20] and *Sherman v. United States.*[21]

Justice De Bruler, concurring in result, complained that "[t]he case before us provides no basis for discarding . . . [entrapment probable cause] . . . [for] [t]he State clearly met that burden in the trial court in this case."[22] Justice De Bruler further expressed concern about the future of the defense of entrapment in Indiana, and questioned exactly what burden is left for the state. The defense of entrapment is "void of substance" if "any degree of concurrence by the accused in criminal design at the time it was first laid before the accused is sufficient to rebut the defense."[23]

While it is true that the abolition of the probable cause to suspect standard eases the difficulty of rebutting an entrapment defense, it is probably premature to grieve the demise of the defense itself. Even if the majority in *Hardin* were heralding what Justice De Bruler characterized as a mere showing "that the accused was not totally innocent . . . toward the proposition offered by the police,"[24] the burden presumably remains upon the state to make that showing.[25]

A more noxious and more probable result from *Hardin* may derive from its inappropriate application to entrapment defenses raised in trials held prior to *Hardin.* Judge Hoffman, writing for the majority in *Davila v. State,*[26] a recent Third District Court of Appeals decision, referred to *Hardin* and concluded that "[p]robable cause to suspect the accused in an entrapment case was *formerly required* in Indiana . . . ."[27] Judge Staton, concurring in the result, properly pointed out that the majority is essentially applying *Hardin* retroactively, and that such application is not only wrong, but also unnecessary, since the facts supported a probable cause to suspect.[28]

Two aspects of the *Hardin* decision may have induced the misunderstanding of its application. First, the majority in *Hardin* referred to the legislative guidance as support for its holding. However, even the legislature is prohibited from creating a law ex

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[20]287 U.S. 435 (1932).

[21]356 U.S. 369 (1958).

[22]358 N.E.2d at 137.

[23]*Id.*

[24]*Id.*

[25]Justice De Bruler's fear may be justified. In Davila v. State 360 N.E.2d 283 (Ind. Ct. App. 1977), Judge Hoffman stated: "Properly raised the defense of entrapment must resolve these two issues by showing the general innocence of the accused in the absence of police interference." *Id.* at 286.

[26]*Id.* at 283.

[27]*Id.* at 285 (emphasis added).

[28]*Id.* 287.

post facto;[29] and the entrapment portion of the Penal Code does not purport to take effect until July 1, 1977, when it may properly be applied only to prosecutions of crimes occurring after that date. The *Hardin* decision's present tense abolition of the probable cause to suspect rule was handed down on December 30, 1976, a full six months before the effective date of the Penal Code. Yet, the reference to the Penal Code was an overt invitation to apply the Penal Code in advance of its operative date.

Second, both of the concurring opinions argue that since the probable cause to suspect burden was met in *Hardin*, there exists no "good and sufficient" reason to discard precedent.[30] The implicit inference to be garnered from such statement is that *Hardin* "here and now" abolishes the probable cause to suspect standard of entrapment.

Even if immediate rejection of the entrapment probable cause standard had been the intent of the court, it is questionable whether such an effect is constitutional when it would operate to the detriment of an accused. In *Marks v. United States*,[31] the United States Supreme Court held that the due process clause of the fifth amendment precludes retroactive application of new criminal law standards to the extent that those standards may impose criminal liability for conduct not punishable under earlier standards.[32] Judge Staton explained in *Davila v. State*[33] that the "new" standard would make no difference in the outcome of either *Hardin* or *Davila*, because of the particular fact situations. However, the majority in each of those decisions, and to some extent the concurring judges in *Hardin*, seem to have accepted the ability of a court to retroactively apply new standards. Yet, in light of *Marks v. United States*,[34] Judge Staton's reaction to *Hardin* is well taken.

It is apparent that when a defendant relies upon the existence of a "probable cause to suspect" entrapment rule, the defendant may be harmed if the rule is changed while the game is in progress. Defense trial strategy may dictate that emphasis be placed upon the lack of probable cause aspect rather than the predisposition aspect of the entrapment defense. If, after the parties have played their cards, trump is changed, one can hardly maintain that the game was fair. If

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[29]U.S. CONST. art. I, § 9, cl. 3 and § 10, cl. 1.

[30]358 N.E.2d at 137.

[31]97 S. Ct. 990 (1977).

[32]The court reaffirmed the position taken in Hamling v. United States, 418 U.S. 87 (1974), that "any constitutional principle enunciated in [a decision] which would serve to *benefit* petitioners *must be applied* in their case." 45 U.S.L.W. at 4235, *quoting* 418 U.S. at 102 (emphasis added).

[33]360 N.E.2d 283 (Ind. Ct. App. 1977).

[34]97 S. Ct. 990 (1977).

a state legislature is barred from changing trump after the cards have been dealt, it should follow that a state supreme court is barred by the due process clause from achieving precisely the same result by judicial construction.[35]

One rebuttal which might be forwarded to oppose the thesis that *Hardin* creates an ex post facto judicial rule of criminal procedure would be that the basic rule, the due process clause, is the same; the court is merely exercising its prerogative to interpret it; and, in fact, it has been in the process of re-interpreting it for some time.[36] However, this argument does not alleviate the seeming necessity to "warn" an accused in advance of trial[37] that the game rules have been changed. *Thomas*, *Shipp*, and *Riding* were not explicit enunciations of the abolishment of the probable cause to suspect standard.

Whether the eventual abolition of the entrapment probable cause rule will be beneficial to the efforts of law enforcement and to society is not the question of importance with regard to the *Hardin* decision. Nor will *Hardin* answer that question in the short run. Rather, as Justice Prentice commented, concurring in the result to *Hardin*, "Such unnecessary activism . . . is subject to criticism as an intrusion upon the legislative prerogative and as destabilizing to our case law."[38]

LEAANNE BERNSTEIN

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[35]Bouie v. City of Columbia, 378 U.S. 347, 353-54 (1964).

[36]*See* Riding v. State, 350 N.E.2d 629 (Ind. 1976); Shipp v. State, 350 N.E.2d 619 (Ind. 1976); Thomas v. State, 345 N.E.2d 835 (Ind. 1976).

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> The Ex Post Facto Clause is a limitation upon the powers of the legislature, and does not of its own force apply to the Judicial Branch of government. But the principle on which the clause is based—the notion that persons have a right to fair warning of that conduct which will give rise to criminal penalties—is fundamental to our concept of constitutional liberty.

Marks v. United States, 97 S. Ct. at 992. (citations omitted).

[38]358 N.E.2d at 137.

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